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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

Emogene Williams Cobin; Bonnie Williams Gilbert; Caroline Williams Giles; Barbara Williams Guinn; Verna Williams Hammond; Donna Williams Lockhart; Ernestine Williams Webb; Delavah Williams; Johnie Williams; Ricky Williams; Ronnie Williams; Sharon Williams PETITIONERS

VS.

James T. Castleberry, Co-executor of the Estate of Joe L. Castleberry, Deceased; City of Conway, Arkansas; Arkansas Faulkner County; Joe Martin; Jocile C. Perry, Co-executor of the Estate of Joe L. Castleberry, Deceased, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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August 22, 1991

QUESTIONS PRESENTED

I.

Whether the United State Court of Appeals for the Eighth Circuit's finding that the respondents' reasons for utilizing their peremptory challenges were not exercised in a purposefully discriminatory manner is clearly erroneous in light of the U. S. Supreme Court's holdings in Batson v. Kentucky and Edmonson v. Leesville Concrete Company, Inc., which states that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race?

II.

In determining whether the government or a private litigant has presented neutral explanation for use of peremptory challenges against blacks, should the court compare the characteristics of the individual which prompted the peremptory strike with characteristics of those not struck by the government or private litigant, in accordance with U.S. v. Wilson and Garrett v. Morris? (i.e., What

is the standard to be used in determining whether a peremptory strike against blacks is constitutionally valid or pretextual?)

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

Petitioners, who filed a civil rights action under 42 U.S.C., Section 1983 (1988) seeking recovery as the surviving relatives of Marvin Williams, an African-American who died in a jail in Faulkner County, Arkansas in 1960, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals

for the Eighth Circuit entered on April 24, 1991, which affirmed an appeal of the district court order denying their motion for a new trial following a jury verdict for the defendants, Faulkner County and two former sheriff's department employees. In the motion for new trial, plaintiffs contend that defense counsel exercised two of three peremptory challenges against African-American venirepersons in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in Williams v. Castleberry, et al, No. 90-2276, (April 24, 1991), is reproduced in Appendix A.

Further, the Memorandum and Order on this issue submitted by the United States District Court for the Eastern District of Arkansas, Western Division, (June 27, 1990), are reproduced in Appendices B and C, respectively. None of the opinions were designated for publication and are not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit which affirmed the United States District Court's denial of petitioners' motion for a new trial following a jury verdict for respondents, was rendered on April 24, 1991. Jurisdiction of this court is invoked pursuant to Rule 10(1)(c) of the Rules of the Supreme Court of the United States, on two levels. First, petitioners assert that the issue posed in Question I to be considered presents a federal question resolved by the United States Court of Appeals for the Eighth Circuit in a way that conflicts with applicable decisions of this court, namely Batson v. Kentucky, and Edmonson v. Leesville Concrete Company, Inc. The second basis for jurisdiction asserted is the issue raised in Question II. herein, which poses an important question of federal law which has not been, but should be, decided by the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the equal protection component of the Fifth Amendment's due process clause; and the equal protection clause of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> no person shall be deprived of life, liberty or property without due process of law.
>
> Fifth Amendment

> no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Fourteenth Amendment

STATEMENT OF THE CASE

The issues presented before the Supreme Court in this Petition for Writ of Certiorari originate from denials of petitioners' motion for new trial by the United States District Court for the Eastern District of Arkansas and the United States Court of Appeals for the Eighth Circuit. The petitioners

filed a civil rights action under 42 U.S.C., § 1983 (1988) seeking recovery as the surviving relatives of Marvin Williams, a 21-year-old African-American who was falsely arrested, bludgeoned to death in a jail in Faulkner County, Arkansas in 1960, and the victim of a conspiracy by defendants to deny him medical treatment and cover up the manner of his death. The motion for new trial was based upon the fact that the attorneys for defendants, Faulkner County and two former sheriff's department employees, used two of three peremptory challenges during voire dire to exclude the two African-American jurors available for the prospective jury from consideration. The reasons offered by the defendants for the racially discriminatory exclusions made in this civil rights action under 42 U.S.C., § 1983 (1988) were blatantly pretextual and racially stereotypical. A review of the record clearly fails to support the findings of the United States District Court and the Court of Appeals. For this reason, petitioners are asking the Supreme Court of

the United States to determine whether those lower court findings are clearly erroneous pursuant to Batson v. Kentucky, 476 U.S. 79 (1985), and Edmonson v. Leesville Concrete Company, Inc., 59 LW 4575 (1991).

In addition to being clearly erroneous, the lower courts' rulings also failed to take into account a determination of whether the racially discriminatory exclusions met the comparability standard for articulating racially-neutral justifications for the use of peremptories that had been set forth in United States v. Wilson 853 F.2d 606 (8th Cir. 1988).

For this reason, petitioners are asking the court to rule on the issue of setting comparability standards for articulating racially-neutral justifications for the use of peremptories. Petitioners contend that a ruling on this issue is of exceptional public importance, as standards must be set forth to prevent the government and private litigants from being able to merely fabricate pretexual

reasons to conceal racially discriminatory motives in excluding African-American venirepersons. This is exactly what happened in the current case, and it undoubtedly has happened in other instances, and will continue to do so unless the issue is resolved. The future and credibility of our nation's judicial system mandates that its integrity be preserved. Resolution of the issue is imperative for this purpose.

In addition, resolution of the issue of whether petitioners received a fair day in court is also imperative. As in Batson v. Kentucky, supra., and Edmonson v. Leesville Concrete Company Co., supra., petitioners are asking the court to recognize the impropriety of racial bias in this particular case, and to hold that the race-based exclusion violates the equal protection rights of the challenged jurors. In the present case, race was the sole reason for denying the excluded African-American venirepersons the honor and privilege of participating on the jury. A review of the facts

of this case, which are fascinating in entirety, will reveal that the acts set forth in this lawsuit were the result of racially discriminatory motives that occurred in an era of our history that was replete with racial tension and strife. The defendants had a very clear motive for wanting to ensure that no blacks sat on the jury because the stakes were high - even though their efforts to thwart the truth resulted in a twenty-four year delay before the manner of decedent's death was finally revealed. They were white men who were accused of violating the civil rights of a black man by murdering him. The stakes were high enough that they intentionally excluded two African-American venirepersons from the jury panel. For this reason, justice was not done when the case went to trial, and the petitioners, on behalf of the decedent, did not receive a fair day in court.

In addition, a recitation of the facts in this case will illuminate the great injustice that was done to Marvin Williams, After the 1960 murder,

the defendants, Faulkner County and two former sheriff's department employees, conspired to cover up his death by failing to release medical information, - including the autopsy report - and by threatening an eyewitness to the beating not to reveal what he saw. The grave injustice continued twenty-eight years later in the courtroom at trial, as defendants further perpetuated their conspiracy to cover up Marvin Williams' wrongful death through lies and fabrications. In addition, the defendants purposely acted to minimize petitioners' opportunity for a fair trial by excluding all black venirepersons from the jury panel by offering pretexual and racially stereotypical excuses for the exclusion. The end result of these deliberate and grossly wrongful acts is that justice has yet to be done.

Petitioners and their present counsel, who was retained subsequent to rulings of the other courts, are asking the Supreme Court to provide a catharsis for resolution of this matter, and to ensure that

petitioners will finally be given the opportunity they and Marvin Williams long for and deserve to receive a fair trial on this matter. It has yet to occur, and they are asking the Court, as the final arbiter in this matter, to protect Marvin Williams' constitutional rights, as well as those of the wrongfully excluded jurors.

Petitioners and their counsel have full confidence in the Court's inherent sense of fairness and abilities, and they respectfully ask the Court to consider this matter carefully, and to reach a decision that will uphold the integrity of the judicial system by ensuring that justice will prevail by inuring to protect the rights of the decedent and wrongfully excluded jurors.

Marvin Williams, of Menifee, Arkansas came into custody of the Conway police in the early hours of May 6, 1960, after being falsely arrested for being drunk in a parked car on Markham Street in Conway. He was found dead in his cell a few hours later. At a hastily called coroner's inquest that began

about noon on the same day, by the elected coroner, R. A. McNutt (now deceased), and George Hartje, the Prosecuting Attorney, officers O. H. Bill Mullenax and Marvin Iberg testified that they had found Williams in the car and taken him and a friend, Joe Flakes, to jail at the Faulkner County Courthouse.

The officers' position was that Williams had been heavily intoxicated and "stuporous" when they arrested him, and that he fell while entering the jail and struck his forehead on the west side of the courthouse steps, causing a small cut. The defendants further elaborated that as they supported the "drunken" Williams and took him to the jail, a strong wind arose and it began to rain very hard. When the wind and rain hit Marvin Williams, they contend that he "revived briefly, straightened up and the officers relaxed their grip on him. At that time, Marvin Williams suddenly fell forward and the officers were unable to catch him and prevent his fall. The result of the fall was that Marvin Williams struck his head on the courthouse

steps. The officers then picked Marvin Williams up and took him inside."[1] The officers' version of these events, including Williams' drunkenness and cause of death, are not supported by the medical evidence and testimony. The plaintiffs contend in their lawsuit that after Marvin Williams' false arrest, the arresting officers and/or jailer and sheriff actually beat Marvin Williams before arrival at the jail, after decedent was in jail, or both, causing serious physical injury, and then denied him medical treatment. Medical evidence shows that Marvin Williams' death was the result of a fracture at the base of the skull, an epidural hematoma, and a contusion of the brain.[2]

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[1] The "official" version of the events is recited in a pre-trial brief at pages 2 and 3 (attached as appendix D), submitted by defendants to the United States District Court prior to the jury trial conducted in 1987. Note that these contentions, which were the foundations of the arresting officers' testimony at the coroner's inquest, criminal trial of Iberg and Mullenax (the Conway arresting officers) in 1985 (who were acquitted by a jury in September of that year), and civil trial in 1988, are alleged by the plaintiffs to be false and perpetuated in furtherance of their conspiracy to cover up the false arrest and manner of death of Marvin Williams, as alleged in ¶ 40, page 5 of the complaint, attached hereto as appendix E.

[2] This was the conclusion of Dr. Edward O. Fox, the pathologist who performed the autopsy, and supported by

The coroner's inquest, which was comprised of 12 white men, concluded after four hours that Williams' death was accidental. This conclusion was drawn without the benefit of the results of an autopsy conducted at 3 p.m. that same day at the University of Arkansas Medical Center. The post-mortem, conducted by Dr. Edward O. Fox, who now lives in New Jersey, and Dr. Lloyd D. Seager, chairman of the Department of Pharmacology, revealed that Williams tested negative for alcohol content. In addition, the cause of death was attributed to a fractured skull and concussion behind the left ear. Those findings were not presented to the inquest panel.

Dr. Fox's findings concluded that the death was the result of severe head injuries incurred from being struck forcefully behind the left ear with some instrument. Fox further said the indentation in Williams' skull from the blow was clearly definable. Further, the blow was so powerful that it

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three other medical experts, including Dr. Fahmy Malak, Arkansas' chief medical examiner.

literally split his skull almost half way down the back of his head.[3]

Further, a superficial injury to Williams' right forehead that was reportedly suffered in the alleged fall was considered minor. But an unnamed Conway physician was quoted at that time by then-prosecutor George Hartje, Jr. (later elected Circuit Judge and then denied re-election upon conclusion of the civil case) as saying that the obvious bruised and swollen area behind Williams' left ear could have somehow been caused by the minor injury to his forehead.[4]

Suspecting that the results of the coroner's inquest were symptomatic of a cover-up, the Williams family did not believe that Marvin's death was attributable to a fall while intoxicated. Delevah and Johnie Williams, the parents of Marvin Williams, approached two local attorneys and the Federal Bureau of Investigation with their concerns

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[3] This was reported in the Arkansas Democrat on July 25, 1984, said article attached hereto as appendix 6.

[4] This was reported in the Arkansas Democrat on July 25, 1984.

that the death actually involved foul play. The attorneys and the FBI told them there was no ground for a lawsuit or further investigation. Discouraged by their rebuffed attempted to launch an investigation of their son's death, the Williams were compelled to drop the issue. In addition, due to the severe racism prevalent in the early 60's and the structure of the area's power base, Delavah Williams feared reprisals if the matter was aggressively pursued, as evidenced by his testimony at trial. (See transcript excerpts attached hereto as appendix F, pages 6-9.)

The case was given new life twenty-four years later, when Charles Hackney, an individual who had been an inmate at the Faulkner County jail the night of Williams' arrest, came forward in 1984 to tell Mike Masterson, an investigative reporter with the Arkansas Democrat, that he had additional evidence that Marvin Williams had been murdered in the jail on May 6, 1960.

Hackney, who was an inmate at the time at the Wrightsville Unit of the Arkansas Department of Correction, said that during his incarceration in the Faulkner County jail on May 6, 1960, he witnessed Williams being beaten by two officers in civilian clothes. He said that he saw Martin and Castleberry (the jailer and sheriff) enter the black area of the jail (which was then unlawfully segregated) and remove Williams to the top of a flight of stairs, where they both beat him. Hackney stated that one of the defendants, apparently Castleberry, said: "That ought to take care of that Black son-of-a-bitch forever," and that person directed another, apparently Martin, to clean up the area where the beating occurred.[5]

Hackney told reporters in July, 1984 that he was in the Faulkner County jail for grand larceny

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[5] Hackney, who was incarcerated as an habitual offender, testified before a special grand jury that indicted Iberg and Mullenax, as well as the criminal trial and civil trial. He gave his account to Masterson in an article reported in the Arkansas Democrat on February 11, 1985, attached hereto as appendix H. Also see ¶ 21 of page 6, and ¶s 33-35 of page 8 of plaintiff's complaint.

on May 6, 1960, when wind and rain gusting through a broken windowpane awakened him in a bull pen cell at 2 a.m. He said he heard noises hear the stairway that led up to the fourth floor cell block and that he moved toward the center of the cell for a closer look. Hackney saw two men in civilian clothes carrying a listless black man between them.

Hackney said one man asked the other where the prisoner had been found. The other responded he had been sleeping in a truck with his feet sticking out the window. The men dropped Williams to the floor and began striking him "more than 10 times" with what looked like blackjacks, Hackney said. After the beating, Hackney said the two men dragged the prisoner out of his sight into a nearby cell with a solid door where Hackney would hear additional blows.[6]

In addition, that night, Hackney was told by a co-conspirator whose identity is presently unknown, that if he talked about what he saw, he "would go

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[6] This was reported in the Arkansas Democrat on February 11, 1985.

out the same way."[7] Because he was threatened by co-conspirators, Hackney testified at the coroner's inquest that he did not see anything but only heard Marvin Williams' moans from the black section of the jail.

Hackney also told authorities and the Arkansas Democrat that he was taken to a small room in the courthouse later that morning and threatened by two county officials, including the prosecuting attorney, who ordered Hackney to lie at the inquest about what he had seen. As a result, Hackney testified at the coroner's inquest that he did not see anything, but only heard Marvin Williams' moans from the black section of the jail. Hackney later told the Arkansas Democrat that he lied at the inquest to protect himself.

Also at the inquest, Joe Martin, Castleberry's deputy jailer at the time, testified that he had discussed work with Williams in the cell block about 1:15 a.m. At that time, Martin said Williams

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[7] **See paragraph 36 of page 9 of plaintiffs' complaint.**

appeared uninjured except for the forehead wound and was talking about bailing out before 7 a.m. to be at his job. Martin said he testified he had agreed to awaken Williams by 7 a.m., but did not fulfil that promise after looking into the cell about 7 a.m. and finding Williams asleep. He said he looked in again around 9 a.m. and found Williams dead about noon the next day.

Iberg also testified at the inquest that he came back twice with former Police Chief C. O. Hensley (now deceased) that night to check on Williams. Iberg said Williams was sleeping and appeared all right both times.

Hackney also told the newspaper that although two FBI agents interviewed him in 1961 for a federal investigation that never developed, he had not heard the story about Williams' alleged fall on the courthouse steps until March 10, 1984, when another inmate informed him. Upon learning this fact, Hackney began writing state and federal officials about what he said he witnessed. As a result, the

FBI did a limited two week inquiry into the death which consisted primarily of interviewing Hackney and some other youths who had been with Williams the night he died.

In addition, the Democrat reported on July 15, 1984 that the FBI apparently never obtained a copy of the autopsy report during either investigation, and that Dr. Fox was never interviewed by police or the FBI about the autopsy.

The civil rights lawsuit was filed in September, 1985, alleging that Castleberry, Hartje, Martin, Iberg, Mullenax and the city and county falsely arrested Marvin Williams, severely beat him, and then conspired to deny him medical treatment and cover up the manner of this death. A special grand jury was empaneled by Governor Bill Clinton's designation in early 1985, and Mullenax and Iberg were tried and acquitted of Williams' murder in 1987. In 1986, the City of Conway, Iberg, Mullenax and George F. Hartje were dismissed as defendants by the lower courts. The civil case

was tried in July, 1988, and the all white jury found in favor of remaining defendants. Details of the voire dire in which the two African-American venirepersons were excluded from jury duty will be presented in petitioners' arguments set forth herein.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S RULING THAT THE RESPONDENTS' REASONS FOR UTILIZING THEIR PEREMPTORY CHALLENGES WERE NOT EXERCISED IN A PURPOSEFULLY DISCRIMINATORY MANNER IS CLEARLY ERRONEOUS IN LIGHT OF THE HOLDINGS IN BATSON V. KENTUCKY AND EDMONSON V. LEESVILLE CONCRETE COMPANY, INC., THAT A PRIVATE LITIGANT IN A CIVIL CASE MAY NOT USE PEREMPTORY CHALLENGES TO EXCLUDE JURORS ON ACCOUNT OF RACE.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER IN INSTANCES WHERE THE GOVERNMENT OR A PRIVATE LITIGANT HAS PRESENTED NEUTRAL EXPLANATION FOR USE OF PEREMPTORY CHALLENGES AGAINST BLACKS, THE COURT SHOULD COMPARE THE CHARACTERISTICS OF THE INDIVIDUAL WHICH PROMPTED THE PEREMPTORY STRIKE WITH CHARACTERISTICS OF THOSE NOT STRUCK BY THE GOVERNMENT OR PRIVATE LITIGANT, IN ACCORDANCE WITH U.S. V. WILSON, (i.e., WHAT IS THE STANDARD TO BE

USED IN DETERMINING WHETHER A PEREMPTORY STRIKE AGAINST BLACKS IS CONSTITUTIONALLY VALID OR PRETEXTUAL?)

Petitioners are requesting the Supreme Court of the United States to grant their Petition for Writ of Certiorari for one simple reason - justice requires it. Racial discrimination occurred in the jury selection of the venirepersons empaneled to hear the civil rights lawsuit filed on behalf of Marvin Williams, and the United States District Court and Eighth Circuit Court of Appeals wrongfully condoned it. (See decisions, attached as appendices A and C hereto.) Both courts were clearly erroneous in their holdings, and as a result, petitioners have yet to receive a fair day in court.

Therefore, petitioners appeal to the Supreme Court of the United States as the final arbiter of justice. Racial discrimination has no place in the courtroom, and the racial stereotypes interjected into this case which marred the integrity of the judicial system and prevented petitioners from receiving a fair proceeding free of the

invidiousness of racial bias will not be remedied without the high court's assistance.

The Supreme Court of the United States emphasized the tremendous importance of civil proceedings and the significance of a litigant's right to receive a fair trial free of the vestiges of race discrimination in Edmonson v. Leesville Concrete Company, Inc., supra, which held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race.

The court stated:

> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. Rose v. Mitchell, 443 U.S. 545, 556 (1979); Smith v. Texas, 311 U.S. 128, 130 (1940). In the many times we have addressed the problem of racial bias in our system of justice, we have not "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." Powers, 449 U.S., at _____ (slip Op. 1). To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.

Leesville, supra, at 1578.

On July 20, 1988, racial discrimination was committed before United States District Court Judge G. Thomas Eisele in Little Rock, Arkansas at the civil trial of this lawsuit. William Adkisson, attorney for defendants Faulkner County and Joe Martin; and Robert W. Henry, attorney for the Estate of Joe L. Castleberry, used two of their three peremptory challenges to exclude James Fountain and Veola Sebastian, the only two black persons on the venire. After the jury was seated, John Wesley Hall, Jr., counsel for plaintiffs, moved for a mistrial contending that the strikes were racially motivated. After debating whether Batson applied to civil cases, defense counsel volunteered their reasons for striking the two potential jurors. The Court ruled those reasons were neutral and denied plaintiff's motion. The trial then proceeded before an all-white jury.

The jury ruled favorable to defendants after a five day trial. Within thirty days, plaintiffs

filed notice of appeal renewing their motion for new trial, attached hereto as appendix AA. United States District Judge G. Thomas Eisele ruled on petitioners' motion two years later on June 27, 1990, after awaiting a ruling upon the Eighth Circuit's rehearing en banc in United States v. Wilson, 867 F.2d 486 (8th Cir. 1989).

In rendering this decision, Judge Eisele did not reach the question of whether Batson applied, reasoning that even if it did, the plaintiffs were not deprived of equal protection because the striking of the two black venirepersons was based on racially neutral reasons. In reaching this conclusion, Judge Eisele correctly applied Batson's three-step approach in considering a litigant's equal protection claim, but incorrectly held that defendants' proffered reasons for striking the black venirepersons were legitimate and racially neutral.

In accordance with Batson, the court ruled that plaintiffs established a prima facie case of pur-

poseful discrimination solely on evidence concerning the defendants' exercise of peremptory challenges at the petitioners' trial. Judge Eisele determined that plaintiffs showed they are members of a cognizable racial group and that the defendants used peremptory challenges to remove from the venire members of the plaintiffs' own race. Id., 476 U.S. at 96. Secondly, the court held plaintiffs could rely upon a presumption that peremptory challenges permit "those to discriminate who are of a mind to discriminate," and that an inference of purposeful discrimination sufficient to require an explanation for the challenge was created. The Court based this on the fact that defendants were white and Marvin Williams was black, as well as the racial climate of the 1960's.

In its opinion, the Court correctly stated at page 7 that defendants, in accordance with Batson, may not rebut a prima facie case of discrimination by affirming their "good faith in making individual selections," Id., 476 U.S. at 98, or relying on

counsel's "assumption - or his intuitive judgment - that [the venireperson] would be partial to [the plaintiffs] because of their shared race." Id., at 97.

Judge Eisele went on to correctly note that the defendants must give a "'clear and reasonably specific' explanation of [their] 'legitimate reasons' for exercising the challenges." Id., at 98 n. 20 (citations omitted), and that plaintiffs may then attempt to demonstrate that the proffered reasons are pretexual. United States v. Wilson, 816 F.2d 421, 423 (8th Cir. 1987).

The Court and petitioners part company in that although the Court reluctantly condoned the legitimacy of the reasons proffered by defendants' counsel for excluding the black venirepersons, the plaintiffs do not. The Court erred in making this assessment, both in its interpretation of the facts, and in its failure to apply the comparability standard set forth in United States v. Wilson, supra, and Garrett v. Morris, 815 F.2d 509 (8th

Cir. 1987), Crt. denied, _____ U.S. _____, 108 S. Ct. 233, 98 L. Ed. 2d, 91 (1987). The Eighth Circuit clearly erred in its holding which rubber stamped Judge Eisele's decision. The District Court's findings that defense counsel exercised their strikes according to neutral criteria, and not for racially discriminatory purposes, does not contain adequate support in the record. Even though the Eighth Circuit's decision was based on an affirmation of the United States District Court's findings of fact, pursuant to Federal Rule of Civil Procedure 52(a), that finding may be set aside by a higher court when determined to be clearly erroneous.

The rule provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness." However, in Anderson v. Bessemer City, 470 U.S. 563, 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), the United States Supreme Court, in quoting

United States v. United States Gypsum Co., 333 U.S. 364, 394-395, states: "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

In the present case, a mistake was clearly committed by the trial judge and Eighth Circuit in affirming defendants' peremptory strikes of the black venirepersons. The reasons offered for the strike were pretexual. Beyond that, the reason offered for the strike of one of the venirepersons, Veola Sebastian, was racially discriminatory and stereotypical on its face. Before discussing the factual circumstances surrounding the peremptory strikes, petitioners submit to the Court that the proper standard for determining whether the strikes were neutral was not employed by the Court in assessing the situation. That standard is set forth in two Eighth Circuit Court rulings, United States v.

Wilson, 853 F.2d 606 (8th Cir. 1988), and Garrett v. Morris, supra.

U.S. v. Wilson, 853 F.2d 606 (8th Cir. 1988), was first heard by the United States Court of Appeals in May, 1988, after defendant's conviction in the United States District Court for the Eastern District of Arkansas, Garnett Thomas Eisele, Chief Judge, of defrauding the government, was affirmed by the Court of Appeals, 806 F.2d 171. On rehearing, the Court of Appeals, 815 F.2d 52, vacated the affirmance and remanded the case for hearing. Following the hearing in the District Court ruling that there had been no Batson violation, defendant appealed. The Court of Appeals reversed and remanded the case, holding that in determining whether a prosecutor has presented neutral explanation for use of peremptory challenges against blacks, the Court must compare the characteristics of the individual which prompted the Government's strike with characteristics of those not struck by the Government.

The Court also noted that "what constitutes a neutral explanation is a question of comparability." Id., at 610. The Court stated:

> Essentially, one must compare the characteristics of the individual which prompted the Government's strike with the characteristics of those not struck by the Government. In order to have a neutral explanation, the characteristics of the stricken individual cannot be present in those white panel members not struck by the Government. For example, if the Government strikes one prospective black juror because of the cut of his or her clothing, this peremptory challenge will be suspect if the Government allows white panel members with a similar cut of cloth to remain on the panel. Other circuits have adopted this concept of neutrality. See, e.g., United States v. Thompson, 827 F.2d 1254, 1260-61 (9th Cir. 1987); see also Roman v. Abrams, 822 F.2d 214, 228 (2d Cir. 1987) (comparability under a sixth amendment analysis); Garrett v. Morris, 815 F.2d 509, 514 (8th Cir.) (comparability under application of Swain principles), cert. denied, ____ U.S. _____, 108 S.Ct. 233, 98 L.Ed.2d 191 (1987).

U.S. v. Wilson, 853 F2d. 606, 610 (8th Cir. 1988).

In his opinion, Judge Eisele stated that he had stayed the ruling on plaintiffs' motion for new trial due to the fact that Wilson had been vacated for reconsideration en banc, Id., 861 F.2d 514.

Wilson was decided, Id., 884 F.2d 1121 (8th Cir. 1989) (en banc). In rendering his decision, Judge Eisele stated at page 10, that:

> "It is unclear how much of this comparability test remains. Upon rehearing en banc, the Eighth Circuit explicitly chose not to address the Government's explanation for five of the six strikes and focused on a sixth in which comparability was not clearly at issue. United States v. Wilson, supra, 884 F.2d at 1122. The Government explained it had exercised the sixth strike against a black venireperson because it had information that the defendant, a prominent black attorney, would attempt to contact jurors and, the Government reasoned, would more likely approach a black juror who resideed in the same town as the defendant than white jurors who also lived in the same town. Id., 1122-23. The Court concluded that this explanation constituted "a stereotypical racial reason for striking the potential black juror ..." Id., at 1124. In short, the Court held, the explanation demonstrated that the strike was used because of the juror's racial affiliation, and therefore violated Batson.
>
> "Unlike Wilson, the explanation offered by the defendants for striking Ms. Sebastian does not depend on her racial affiliation. If through voire dire, or otherwise, it develops that a particular juror is deficient in the intelligence needed to understand some aspect of the case, then that circumstance will provide an adequate basis for exercise of a peremptory challenge under Batson. Such assessments are indeed subjective. Yet it is the very essence of

> the peremptory challenge to allow an attorney to "act on only limited information or hunch" in exercising his "intuitive judgment" that a particular juror would be unfit for the case to be tried. Batson, 476 U.S. at 123 (Burger, C.J. dissenting). Batson modifies the breadth of an attorney's discretion to strike jurors by foreclosing as a possible reason for such strikes the intuitive judgment that a potential juror will favor his client's adversary because of shared racial or ethnic affiliation. Batson does not prohibit subjective assessments of a juror's qualifications when such assessments are based on qualities other than race.
>
> Ultimately, this Court's obligation to determine whether peremptories were exercised for the purpose of intentional discrimination requires a finding of fact. Batson, 476 U.S. at 98 n. 21. Having conducted the voire dire in chambers, on a one-to-one basis, and having had the opportunity to closely observe the demeanor of the jurors, the Court finds that the defendants' proffered explanation was clear and specific and entirely credible. Moreover, it is clear to the Court that none of the other white venirepersons who formed the petit jury exhibited characteristics comparable to those that led the defendants to make their strikes. In sum, the Court does not find intentional discrimination in the defendants' exercise of peremptory challenges."

A review of the facts in this matter will show that Judge Eisele and the Eighth Circuit clearly erred in determining that: 1) the explanations proffered by defendants for striking the jurors

were not pretexual, and were clear, specific and entirely credible; 2) that none of the other white venirepersons who formed the petit jury exhibited characteristics comparable to those that led the defendants to make their strikes; and 3) that intentional discrimination in the defendants' exercise of peremptory challenges did not occur.

Petitioners have submitted an exercepted voire dire transcript to the Supreme Court along with this petition for Writ of Certiorari. The transcript records the Court's voire dire examination of the two black venirepersons from the panel who were stricken by defendants, and the discussion surrounding the plaintiffs' motion for mistrial resulting therefrom.

James Fountain and Veola Sebastian were the only two black individuals on a venire of prospective jurors. Because the plaintiffs' lawsuit, as well as the related criminal investigation, generated substantial media attention prior to trial, the Court asked during

voire dire whether any of the members of the venire had read or seen news accounts about the case. Eighteen of the first twenty-three members of the venire said they had - including Ms. Sebastian and Mr. Fountain. (Their transcripted testimony is attached hereto as appendices I and J, respectively.)

In rendering his decision, Judge Eisele and the Eighth Circuit rubber stamped the reasons for striking those two jurors provided both in defendants' reply to plaintiffs' motion for mistrial, and the transcript, apparently without giving any independent thought or analysis to the voire dire examinations themselves, which clearly reveal defendants' contentions to be pretexual and racially stereotypical.

In defendants' brief in support of reply to plaintiffs' motion for new trial, attached hereto as appendix K, defendants state, as to Fountain, that the reasons supporting his strike are "clearly nonracial." Defendants state at page 3 of their

brief that: "Fountain, the record will show, held a masters in psychology, was a college professor and minister, yet was unemployed. He had sued his former employer and was the divorced father of five children. These characteristics create a picture of instability, undesirable in a juror."

As to Veola Sebastian, defendants contend: "Veola Sebastian was an unmarried mother of two, and a factory worker by occupation. At the time she was called, the voire dire was being conducted on an individual basis in chambers, allowing a more relaxed and personal examination. Ms. Sebastian's responses to questions from the Court and the attorneys were mostly monosyllabic in nature. She gave a distinct appearance of having a low intelligence level, reflected by her lack of responsiveness. Developing an opinion about one's intelligence is unquestionably a subjective undertaking, but intellect is also an unquestionable legitimate factor to consider, particularly for a case expected to extend several days and produce the

testimony of a forensic pathologist and a neurosurgeon."

Further, the explanation offered at voire dire by defendants for the exclusion of Mr. Fountain and Ms. Sebastian is even more offensive, pretexual, and racially stereotypical. At pages 94-96 of the voire dire transcript, Robert Henry, counsel for defendant Castleberry, volunteered his reasons for excluding the black venirepersons in question, and the Court's response is recorded in appendix N attached hereto.

At pages 97-99 of the voire dire transcript, the Court also recorded the objections of John Wesley Hall, plaintiffs' counsel to the defendants' reasoning, and the responses of defendant and the Court. (Attached hereto as appendix O.)

In summary, a review of the actual transcript of the voire dire examination of Mr. Fountain and Ms. Sebastian fails to give <u>any</u> semblance of credence to the pretexual reasons offered by defendants for their exclusions, or to Judge Eisele's

contention at page 11 of his Memorandum and Order attached hereto as appendix C that "the defendants' proffered explanation was clear and specific and entirely credible." In addition, the record fails to make any reference or give any credence to Judge Eisele's assertion at page 9 of his written Memorandum and Order that "Ms. Sebastian responded to the Court's questioning in a noticeable slow and tentative manner," that her demeanor during voire dire suggested a poor educational background," or that her intelligence was deficient. As to Mr. Fountain, the recorded voire dire provides no reference point for Mr. Henry's contention that Fountain was "squirrely."

Secondly, the record fails to reflect any basis for Judge Eisele's contention at page 11 of his Order that "none of the other white venirepersons who formed the petit jury exhibited characteristics comparable to those that led the defendants to make their strikes." In reality, the record fails to reflect any attempt by either the Court or defense

counsel to question any other white venirepersons in an effort to gauge their educational background, speaking ability, or intelligence level.

Third, a review of the complete factual history, applicable law, voire dire transcript, and lower court decisions, will paint a vividly disturbing portrait of the blatant racial discrimination which occurred in this case.

The list of information available on the jurors at the time of trial, which was July 20, 1988, is attached hereto as appendix L. It states that James Fountain, of Little Rock, is aged 39 and divorced, with five children. It cites his profession as a minister and college professor, and states that he has been an Arkansas resident for life. On page 25 of the voire dire transcript, Mr. Fountain stated, in response to questions from the Court whether any members of the venire had ever participated in a lawsuit, that he was a plaintiff in a lawsuit filed against the university. The Court further questioned him at page 54 of the

transcript. The Court asked Mr. Fountain if he had heard something or read anything about the Williams case either in the newspaper, television or radio. His response is attached hereto as appendix J.

The voire dire examination of Ms. Sebastian begins at page 72 of the transcript, attached hereto as appendix I.

The reasons proffered by defendants in the Williams' case for the exclusion of Ms. Sebastian are virtually identical to the reasons set forth by the prosecutor in another Eighth Circuit case that were struck down as pretexual and discriminatory on appeal to that court. In Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987), Gerald Duane Garret appealed from an order of the District Court denying his petition for writ of habeas corpus. Garrett argued that the State's exercise of its peremptory challenges to exclude all black jurors form the petit jury panel at his murder trial violated his Sixth Amendment right to a jury chosen from a fair cross-section of the community and his Fourteenth

Amendment right to equal protection of the laws. The Court of Appeals reversed the District Court on the basis that the record in the case demonstrated that the prosecutor used his peremptory challenges in an impermissibly discriminatory manner.

In that case, Garrett, who was black, was tried in May 1980 in St. Louis County Circuit charge on capital murder charges. Following a lengthy voire dire examination of prospective jurors, the prosecutor utilized three of his peremptory challenges to exclude the only three black venirepersons from the petit jury panel. When the defense moved for a mistrial on the ground that the prosecutor's decision to strike the three jurors was based on improper racial considerations, the prosecutor volunteered the following explanation for his actions:

> I think the record should reflect that the fact that the three jurors was black was not my reason for striking them, but, instead, it was the background, education, and knowledge to understand fairly sophisticated scientific evidence which I intend to bring to the jury in this case.

Garrett v. Morris, 815 F.2d 509, 510 (1987).

The trial judge denied the motion for mistrial and Garrett was subsequently convicted of first-degree murder and sentenced to life imprisonment. The Missouri Supreme Court affirmed his conviction and sentence on direct appeal, and Garrett then filed the present habeas corpus petition. The District Court rejected the claim and his appeal followed.

The Court analyzed Garrett's claim that the prosecutor's use of peremptory challenges violated his right to equal protection of the laws pursuant to Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In its analysis, the Court stated a defendant can make out a prima facie case of purposeful discrimination on proof that the prosecutor perverted the peremptory-challenge system by using his challenges to exclude blacks from the jury for reasons unrelated to the outcome of the case on trial, but that a defendant cannot establish an equal-protection violation "solely on proof of the prosecutor's use of peremptory chal-

lenges to strike black jurors at the defendant's own trial." Garrett, Id., at 511, quoting Griffith v. Kentucky, _____ U.S. _____, 107 S.Ct. 708, 7190, 93 L.Ed.2d 649 (1987).

The Court further stated that although Swain was overruled in part in Batson v. Kentucky, supra in which the Supreme Court held that a defendant "may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial," Id., at 511, quoting 106 S.Ct. at 1722-23, Batson did not apply retroactive to a case on federal habeas review. The Court, however, held that Garrett's record was sufficient to establish a violation of the equal-protection principles of Swain, and therefore overcame the presumption protecting the prosecutor in that case.

In Garrett, the Eighth Circuit ruled that the reasons proffered by the prosecutor for the exclusions were actually racially motivated and a

pretext for discrimination. The court looked to the record of the voire dire and determined that the prosecutor's questions to the assembled venire "focused mainly on prior jury service, acquaintance with prospective witnesses, past association or involvement with the criminal-justice system, knowledge or information about the case, and past area of residence," Garrett, supra, at 513.

The Court then looked to the record and compared the background of the black jurors to the white venirepersons and determined that the prosecutor's statement that he struck the black jurors on the ground that they "lacked education," was meritless. The blanket assertion applied to three black jurors who were totally different in background, sex, and occupation, and the educational background of the majority of the whites selected as jurors was not radically different to that of the blacks.

In addition, the three excluded blacks all had a high school education, and one had nearly

completed college. Of the remaining white jurors, two had not completed high school, and two did not specify the extent of their education (one had been a factory worker and the other an electrician). In fact, only two of the jurors selected had been graduated from college. A third had an associate degree from a junior college, and the remaining jurors had a high school education. In addition, the court said the record did not indicate that the black jurors had any difficulty understanding or responding to questions which set them apart from white jurors who remained on the jury panel.

In summary, the Garrett court determined that the reasons volunteered for exclusion of the black venirepersons were not fairly supported by the record; that the prosecutor's rationale that the blacks lacked education and knowledge was pretexual in light of his decision not to strike white jurors who differed in no significant way; and that there were no other legitimate trial related reasons for striking all three black jurors. The court stated

that the prosecutor's disclaimer of racial motives was irrelevant because he in effect excluded all blacks from the petit jury in the belief that, as blacks, they were not qualified to serve as jurors at the trial of a black defendant. Under those circumstances, the court was completed to conclude that the proffered explanation was a pretext for purposeful discrimination, and that Garrett's constitutional rights were violated.

In light of the Garrett decision, as well as U.S. v. Wilson, 853 F.2d 606 (8th Cir. 1988), which holds that the court must compare the characteristics of the individual which prompted the government's strike with characteristics of those not struck by the government to determine if a neutral explanation for use of peremptory challenges against blacks has been made; and U.S. v. Wilson, 884 F.2d 1121 (8th Cir. 1989) which holds that the defendant must be given an opportunity to demonstrate that government's proffered reasons for challenging black jurors are pretexual, the

petitioners will analogize the voire dire in Marvin Williams' case with the reasoning asserted therein.

Although the decisions rendered by the District Court and Eighth Circuit clearly show that those courts conducted no meaningful analysis of the Williams' voire dire transcript, in terms of comparing the excluded black jurors to the white venirepersons, it is essential that this be done. A thorough analysis of the manner in which the voire dire was conducted, the types of questions asked, and the lack of comparability between the black and white venirepersons will clearly reveal that the reasons proffered by defendants for exclusion of the black venirepersons were pretexual and racially discriminatory.

The excerpted voire dire shows that the District Court began its inquiry of the jury panel by asking its members if any had any relationships to the individual plaintiffs and defendants. The court then continued to ask a series of questions designed to elicit the following information:

whether any of the panel members lived, or had ever lived in Faulkner County; whether any members had been employed by or worked for Faulkner County; the nature or degree of any relationships to the individual attorneys; the existence and extent of any prior jury service; and if anyone had ever read or heard anything about Marvin Williams' case.

At the conclusion of the series of general questions, Judge Eisele asked the jurors who had heard anything about the case to stand up and state their names. He then asked the venirepersons if any had an opinion as to any issues in the case, requesting that they stand and state their names. (Tr. at 29.) He proceeded to inquire of any individuals who had relatives in law enforcement if they would be prejudiced for or against either party, whether anyone had talked to any of them about the case, and if anyone knew of any reason why they should not be a juror on account of a prejudicial mind set.

At that point, Judge Eisele stated that he was going into chambers and that the individuals who had acknowledged reading or hearing about the case would be called in one at a time for the purpose of conducting a more thorough voire dire. (Tr. at 31.)

While in chambers, Judge Eisele and the attorneys determined that three jurors who had relationships to Faulkner County needed to be questioned, and those jurors were called in. (Tr. at 34-43.) General questions were asked of the three, Jim Crimmins, Suzanne Huseas, and Mary Jo Wade, regarding whether they knew the defendants, had opinions of the case, and whether they paid real property taxes and personal property taxes. (The taxpayer status was a concern as the attorneys felt a judgment rendered against Faulkner County could theoretically result in a tax increase.)

When finished with those individuals, the court went back to the general list and called the remaining venirepersons in for questioning. (Tr. at 44-74.) Those interviewed were questioned in a

general manner regarding what they had heard or seen about the case, and whether it would affect their ability to be an impartial juror. A few jurors were asked specific questions regarding their relationships to individual parties or Faulkner County. One venireperson who was selected to be a juror, Cathy Hollingsworth, was questioned regarding her status as a defendant in a lawsuit. (Tr. at 53.) (Also note that the record reflects that Ms. Hollingsworth was the only white venireperson to reveal her educational background during the entire voire dire process. Tr. at 10-11.)

Aside from Ms. Hollingsworth, who stated in open court that she had received a college degree from the University of Central Arkansas at Conway, none of the other whites were even questioned at all about their educational background. In fact, the record fails to reflect any line of questioning that could even be construed to be designed for the purpose of determining a white venireperson's

intellectual level. Therefore, the only other source of possible determining a panel member's educational background was contained in the juror information sheet, attached hereto as appendix L.

In fact, the question of education did not come up at all during voire dire conducted in chambers until the first black venireperson, Mr. Fountain, was called in. (Tr. at 55.) The first question asked of him by Mr. Adkisson concerned his tenure at the University of Central Arkansas in graduate school No questions were asked regarding his involvement in a lawsuit, which was a reason proffered by defendants for excluding him as a juror. That information was volunteered by Mr. Fountain in open voire dire earlier when the Court asked if any panel members had ever participated in a lawsuit or hearing as a party or witness. Mr. Fountain responded that he had been a plaintiff in chancery court in a lawsuit filed against the university. (Tr. at 25-26.) He further revealed that he was unemployed at that point, but was

waiting for a teaching position at Tuskegee Institute. No questions were asked regarding his marital status, personal life, or anything else that would provide information as to his stability, which was another reason proffered by defendants for striking him as a juror.

As to the only other black venireperson, Ms. Veola Sebastian, (Tr. at 72), the transcript reveals that she responded appropriately to the questions asked of her. In fact, she stated that although she had heard of the case, that she had not formed an opinion about it and that she would not be prejudiced in any way. None of the parties questioned her about her personal life or educational background. In fact, the only information provided on her was that cited on the juror sheet. It revealed that at the time of trial, she was 36 years of age, single with two children, a factory worker, and an Arkansas resident for life. The record fails to reflect any evidence that she was unintelligent and incapable

of understanding the issues in the case. In addition, there was nothing to support Mr. Henry's contention at page 95 of the transcript that she "was the least qualified of all the members of the panel to serve on a jury as complicated as this."

In fact, a comparison of the background of Ms. Sebastian and Mr. Fountain with the other white venirepersons will reveal that some of the white jurors had similar backgrounds.

First, as the Ms. Sebastian, there were two other white women selected as jurors who were her approximate age, had children, and were not married. They were Suzanne M. Huseas, who was 30 years of age, and divorced with one child, and Nancy J. McGowen, who was aged 37, and widowed with one child.

In comparing Ms. Sebastian's educational background with those of the white jurors, it is important to note that although the juror sheet lists her as a factory worker, nowhere does the record reflect that she actually explained what her educa-

tional background was. It was not listed on the juror sheet, and it was not elicited in voire dire, by either the attorneys or Judge Eisele. Because the record is silent on this matter, the reviewing courts had no way of knowing whether Ms. Sebastian was a high school dropout, a high school graduate, a college graduate, or the recipient of some type of vocational training.

As no other white jurors except Ms. Hollingsworth were questioned <u>at all</u> regarding their educational background, the only other source of information in the record on this matter is continued in the juror sheet. A review of the names of the jurors selected for jury duty, attached hereto as appendix L, provides at best, only limited information.

Comparing the list of jurors selected (see appendix M) to the information on the juror sheet, the only way to ascertain the number of college graduates among the whites selected is to look at their occupations and determine which ones were in

professions that generally require a college degree.

The list revealed one retired teacher, two elementary school teachers, one accountant, and one high school teacher. It can be safely assumed that these individuals had college degrees. The only other individual cited who could also be safely presumed to have a college degree was a 51 year-old man who was marketing manager for a life and casualty company.

As to the occupations of other members of the petit jury that are cited on the juror list, it is difficult to ascertain whether college degrees, high school degrees, or vocational technical training was required.

The other jurors not already listed herein included: a 56 year old farmer; a 28 year old divorced woman who worked in sales for an office systems company; a 39 year old man who was married and a field service engineer; a 28 year old married woman who was a warehouse supervisor for a depart-

ment store; and a 39 year old married woman who was a secretary/bookkeeper for an engineering company.

Of those mentioned earlier, Nancy McGowen was a bank teller, and Suzanne Huseas was an aide for a human development center. Between the two, Suzanne Huseas bears the most similarity to Veola Sebastian, as her job, like that of a factory worker, is one that generally does not require a college degree. In addition, neither the job of a factory worker, nor a development aide, generally requires any specialized training or even a high school degree. As the record is unclear on the educational backgrounds of both Ms. Sebastian and Ms. Huseas, their particular circumstances are unknown.

In conclusion, upon examination of the entire record of this matter, including the excerpted voire dire, it is quite apparent that defendants' proffered reasons for excluding both Mr. Fountain and Ms. Sebastian are neither credible nor legitimate.

The defendants' contentions that Ms. Sebastian was incapable of understanding complex medical and scientific testimony and was unresponsive to the questions asked of her are clearly not supported by the record. Further, allegations that her educational background was questionable is irrelevant, as the record fails to provide any conclusive substantiation that her background was poor, that she was unintelligent, or that her background varied significantly from other white venirepersons selected to be on the jury. Further, the record fails to indicate that any attempt was made to determine the educational backgrounds of the white venirepersons or to strike those who clearly did not have advanced educational degrees or training. To take the analysis a step further, no questions were advanced in the record for the specific purpose of determining a juror's intellect - to either black or white jurors.

The record also clearly fails to support the reasons proffered by defendants for striking Mr.

Fountain from the jury panel. In the voire dire, Mr. Henry volunteered that Mr. Fountain would not make a good juror because he was "squirley" [sic], had sued his employer, and "would not make a good juror because of his background and the way he answered questions." (Tr. at 94.)

In reality, the record revealed that Mr. Fountain, who had a master's degree, was a minister and college professor. The record reflects that he provided direct responses to defendants' questions and that although he was unemployed, he was awaiting a prospective position at Tuskegee Institute in Alabama. No other specific questions were asked as to his employment status, or reasons for being unemployed to determine if they were legitimate. (See Tr. at 55.) As to defendants' contention that he had been a plaintiff in a lawsuit against his former employer, (Tr. at 94) again, the record fails to substantiate that claim. The record reflects that Mr. Fountain had been a graduate student at the University of Central Arkansas in

Conway (Faulkner Co.) from 1980-82, (Tr. at 11) and that he sued the University as a plaintiff in a lawsuit in Chancery Court three years prior to the trial. (Tr. at 25-26.) However, nowhere is it mentioned in the record that Fountain had been formerly employed by the university. This appears to be an assumption on the part of defendants' counsel.

Further, the record clearly shows that neither the attorneys nor Judge Eisele elicited from Mr. Fountain any details about the lawsuit. There is absolutely nothing in the record to substantiate defendants' claims that Fountain was unstable or unsuitable as a juror in any way. Furthermore, another panel member who had been a defendant in a lawsuit was selected to be a juror. (See Cathy Hollingsworth voire dire, Tr. at 26.)

Under the circumstances, the defendants' ill advised decision to exercise their peremptory strikes against the only two black venirepersons on the panel was clearly pretextual. In addition, de-

fendants contention that Ms. Sebastian was intellectually inferior to the other white venirepersons was based on a stereotype perpetuated by some Caucasians that blacks are generally less intelligent than whites.[8] This leaves petitioners with the undeniable and irrefutable conclusion that the strikes were based strictly on the impermissible motive of racial discrimination. Although defendants' responses for exercising the strikes appealed to Judge Eisele as being reasonable, in reality, they were hollow excuses for eliminating blacks from the petit jury of a civil rights claim filed by black litigants.

Racial prejudice is a disturbing, yet undeniable part of the framework of our society. The defendants in the Williams' case had every conceivable motive for wanting to exclude blacks from the jury box - especially one with a graduate degree,

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[8] Arthur Jensen, a psychology professor at the University of California, Berkeley, argued in a report published in the Winter 1969 edition of Harvard Educational Review that blacks are less intelligent than whites which accounts for lower IQ test scores of blacks.

like Mr. Fountain. It would be to their distinct advantage to eliminate anyone who had an obvious affiliation or degree of empathy with the African-American culture. White men were on trial for falsely arresting, then murdering, then conspiring to cover up the manner of death of a young black man in a county jail in the racially charged climate of the 1960's. The defendants' future course of life and well-being was at stake. —

In addition - quite frankly - defendants' counsel obviously thought they could get away with this travesty of justice, and unfortunately to this day have done so. At the time of trial, Batson had yet to be construed as applicable to civil cases, and as the racially discriminatory challenges were exercised prior to the Supreme Court's decision in Leesville. In essence, by exercising their peremptory challenges against the only two black panel members, the defendants' counsel gave every appearance of believing that defendants could, once

again, violate Marvin Williams' constitutional rights unscathed.

The conspiracy to violate the constitutional and civil rights of Marvin Williams that began in 1960 continued in the courtroom on July 20, 1988, and has unfortunately, been extended until this day. For the sake of preserving the integrity of the judicial system, as well as ensuring petitioners' well-founded rights to seek redress for the flagrant and gross violation of Marvin Williams' constitutional rights, petitioners are asking the Supreme Court to grant the petition for Writ of Certiorari, and to reverse and remand the Eighth Circuit's affirmance of the District Court's Order. It is petitioners' request that the Court will grant them a long-awaited and much deserved opportunity to simply obtain a fair civil proceeding - with the hope that justice will finally prevail in the matter of the violent, untimely, and wrongful death of Marvin Williams.

CONCLUSIONS

For the foregoing reasons, the Court should grant Cert to determine whether the Eighth Circuit's affirmance of the District Court's denial of plaintiffs' motion for new trial was clearly erroneous in light of the Supreme Court's holdings that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

Emogene Williams Cobin; Bonnie Williams Gilbert; Caroline Williams Giles; Barbara Williams Guinn; Verna Williams Hammond; Donna Williams Lockhart; Ernestine Williams Webb; Delavah Williams; Johnie Williams; Ricky Williams; Ronnie Williams; Sharon Williams PETITIONERS

VS.

James T. Castleberry, Co-executor of the Estate of Joe L. Castleberry, Deceased; City of Conway, Arkansas; Arkansas Faulkner County; Joe Martin; Jocile C. Perry, Co-executor of the Estate of Joe L. Castleberry, Deceased, RESPONDENTS

CERTIFICATE OF SERVICE

I, Jack T. Lassiter, a member of the bar of this court, hereby certify that the annexed Petition for Writ of Certiorari to the Supreme Court of the United States has been timely filed, pursuant to Rule 28.2 of the Rules of this Court by delivery

via Federal Express, postage pre-paid, addressed to the Clerk of this Court.

I further certify that I have served the Petition for Writ of Certiorari on Respondent by placing a copy in the United States Mail, first class, postage pre-paid, addressed as follows: Robert Henry, attorney for Joe Martin an the Estate of Joe L. Castleberry, Deceased, 627 Locust, Conway, AR 72032; and William C. Adkisson, attorney for Faulkner County, 801 Parkway, Conway AR 72032.

JACK T. LASSITER
Attorney for Petitioners

ACKNOWLEDGEMENT

STATE OF ARKANSAS)
) ss
COUNTY OF PULASKI)

Subscribed and sworn before me, a Notary Public, on this 22nd day of August, 1991.

Notary Public

My commission expires:
7-17-91

MILDRED R. KASSLER NOTARY PUBLIC PULASKI COUNTY ARK.

91-1096

FILED
AUG 22 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

Emogene Williams Cobin; Bonnie Williams Gilbert; Caroline Williams Giles; Barbara Williams Guinn; Verna Williams Hammond; Donna Williams Lockhart; Ernestine Williams Webb; Delavah Williams; Johnie Williams; Ricky Williams; Ronnie Williams; Sharon Williams PETITIONERS

VS.

James T. Castleberry, Co-executor of the Estate of Joe L. Castleberry, Deceased; City of Conway, Arkansas; Arkansas Faulkner County; Joe Martin; Jocile C. Perry, Co-executor of the Estate of Joe L. Castleberry, Deceased, RESPONDENTS

APPENDIX

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Attorneys for Petitioners

August 22, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RICKY WILLIAMS, et al., Plaintiffs	)	No. LR-C-84-791
v.	)	
FAULKNER COUNTY, ARKANSAS; JOE MARTIN; and ESTATE OF JOE CASTLEBERRY, Defendants.	)	

MOTION FOR NEW TRIAL

Plaintiff move for a new trial on the ground that the issue of race discrimination in jury selection will require reversal of the judgment under the eighth circuit's latest authority.

Under the decisions of the United States v. Wilson, 816 F.2d 421, 422 (8th Cir. 1987) (Wilson I) and United States v. Wilson, ___ F.2d ___ (8th Cir. No. 87-2280, decided Aug. 5, 1988) (Wilson II), the defendants were constitutionally obligated to give a neutral

explanation of their preemptory challenges of black jurors. Here, they failed to do so.

The reason given for striking the black lady juror was that she did not sound like she could be expected to understand the medical testimony. The same could be said of anyone because it was so subjective, and it fails as a neutral justification under Wilson I & II. To permit the verdict to stand in light of Wilson I & II would facilitate pretextual peremptory challenges. See Wilson II, slip op. at 8:

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> The Government also struck Paul Harris, a black man, because of his outlandish clothing worn the day of voir dire. However, at the Batson hearing, the Government failed to present evidence or explanation as to the clothing of any of the white panel members. Without such an explanation, it is impossible to even

begin an examination of whether this reason is neutral and comparable. The government's explanations for the three other blacks suffer from the same infirmity.

At the time the mistrial motion was made, the court denied plaintiff's motion with great reluctance. At the time, the court may not have had the benefit of Wilson I, as alluded to by the Eighth Circuit which required reliance on Wilson I at the time of the trial.

Therefore, the plaintiff's motion for new trial should be granted or at least a hearing held to further explore the neutrality question.

Respectfully submitted,

JOHN WESLEY HALL, JR.
Attorney at Law
523 West Third Street
Little Rock, AR 72201
(501) 371-9121

CERTIFICATE OF SERVICE

I, John Wesley Hall, Jr., certify that I have mailed a copy of the foregoing to Robert Henry, P. O. Box 1107, Conway, AR 72032, and William Adkisson, P. O. Box 1390, Conway, AR 72032-1390, by regular mail, this __5th_ day of August, 1988.

_____

JOHN WESLEY HALL, JR.

Appendix AA-2

United States Court of Appeals
For the Eighth Circuit

No. 90-2276

Emogene Williams Cobin; Bonnie Williams Gilbert; Caroline Williams Guinn, Verna Williams Hammond; Donna Williams Lockhart; Ernestine Williams Webb; Delavan Williams; Johnie Williams; Ricky Williams; Ronnie; Sharon Williams,

Appellants,

Appeal from the United States District Court for the Eastern District of Arkansas.
(UNPUBLISHED)

v.

James T. Castleberry, Co-executor of the Estate of Joe L. Castleberry, Deceased; City of Conway, Arkansas; Arkansas Faulkner County; Joe Martin; Jocile C. Perry, Co-executor of the Estate of Joe L. Castleberry, Deceased.

Apellees.

Submitted: March 11, 1991

Filed: April 24, 1991

Before McMILLIN, Circuit Judge, BRIGHT, Senior Circuit Judge, and NAGILL, Circuit Judge.

PER CURIAM.

The plaintiffs filed this civil rights action under 42 U.S.C.§ 1983 (1988) seeking recovery as the surviving relatives of Marvin Williams, an African-American who died in a jail in Faulkner County, Arkansas in 1960. They appeal the district court order denying their motion for a new trial following a jury verdict for the defendants. Faulkner County and two former sheriff's department employees. The plaintiffs contend that defense counsel exercised two of four peremptory challenges against African-American venirepersons in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny.

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We have carefully examined the record and are unable to reverse. The

district court's findings that defense counsel exercised their strikes according to neutral criteria, and not for racially discriminatory purposes, contains adequate support in the record. Inasmuch as these supported factual findings form the basis of the district court's judgment, we affirm. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

Appendix A-2

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RICKY WILLIAMS et al
PLAINTIFFS

v. NO. LR-C-84-791

FAULKNER COUNTY, ARKANSAS, et al
DEFENDANTS

ORDER

Pending before the Court is the motion of the plaintiffs for a new trial. The motion requires deciding, first, whether Batson v. Kentucky, 476 U.S. 79 (1986) applies to the use of peremptory challenges to jury venirepersons in a civil case. The second issue, if Batson does apply, is whether the striking of two persons from the jury panel in this case violated plaintiffs' equal protection rights under the standards set forth in Batson and in United States v. Wilson, 816 F.2d 421 (8th Cir. 1987) and United States v. Wilson, 853 F.2d 606 (8th Cir. 1988).

Plaintiffs' motion relies heavily upon the "comparability" standard set forth in the latter Wilson for determining whether a party has articulated a racially neutral reason for striking a prospective juror. However, the judgment in that case was vacated upon the granting of a motion for rehearing en banc. See United States v. Wilson, 861 F.2d 514 (8th Cir. 1988). Although the rehearing had been set for December of 1988, no decision has been

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issued to date. Because of these circumstances, this Court will continue to withhold its decision on the present motion pending the final outcome of the Eighth Circuit's decision in Wilson.

SO ORDERED this 3rd day of August, 1989.

UNITED STATES DISTRICT JUDGE

Appendix B-2

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RICKY WILLIAMS; SHARON WILLIAMS BONNIE WILLIAMS GILBERT; DELAVAH WILLIAMS; JOHNNIE WILLIAMS; RONNIE WILLIAMS; ERNESTINE WILLIAMS WEBB; CAROLINE WILLIAMS GILES; VERNA WILLIAMS HAMMOND; BARBARA WILLIAMS GUINN; and DONNA WILLIAMS LOCKHART The Survivors of MARVIN WILLIAMS PLAINTIFFS

v. Civil No. LR-C-84-791

FAULKNER COUNTY, ARKANSAS; JAMES T. CASTLEBERRY and JOCILE C. PERRY, Co-executors of the Estate of JOE L. CASTLEBERRY, Deceased; and JOE MARTIN DEFENDANTS

MEMORANDUM AND ORDER

Pending before the Court is the plaintiff's motion for a new trial. For the reasons stated below, the motion will be denied.

On May 6, 1960, Mr. Marvin Williams, a black man, died while in police custody at the Faulkner County Jail in Conway, Arkansas. The plaintiffs allege that the individual defendants, a former Faulkner County sheriff

and his deputy, were responsible for the wrongful death of Mr. Williams and deprived him of his civil rights in violation of 42 U.S.C. § § 1981, 1982 and 1985. After a seven-day trial, the jury returned a verdict in favor of the defendants. The plaintiffs contend that a new trial should be granted because the defendants discriminated against black members of the venire during the jury selection process in violation of Batson v. Kentucky, 476 U.S. 79 (1986).

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The defendants used two of their three peremptory challenges to exclude James Fountain and Feola Sebastian, the only two black persons on the venire. After the jury was seated, the plaintiffs moved for a mistrial contending that the strikes were racially motivated. After debating whether Batson applied to civil cases, defense counsel volunteered their reasons for striking the two

potential jurors. The Court found those reasons racially neutral, and therefore denied plaintiff's motion. The trial then proceeded before an all-white jury.

Plaintiffs now renew their contention that the exclusion of the two potential jurors was discriminatory. Plaintiffs also contend that the explanations given by the defendants for their strikes failed to adequately rebut the inference of racial discrimination as required by Batson and several cases interpreting it within this circuit. Specifically, the plaintiffs argue that the defendants' explanation for excluding Ms. Sebastian failed to meet the comparability standard for articulating racially-neutral justifications for the use of peremptories that had been set forth in United States v. Wilson, 853 F2d. 606 (8th Cir. 1988). This Court stayed ruling on the present motion after Wilson now having been decided, Id., 884

F.2d 1121 (8th Cir. 1989) (en banc), the Court will now rule on the motion.

I.

The defendants first respond that Batson applies only in criminal cases. Since the filing of this motion, the Eighth Circuit

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rejected a similar argument and held that Batson does apply in civil cases in federal court, at least where the discriminatory use of peremptories may be attributed to a state actor.

In Reynolds v. City of Little Rock, 893 F.2d 1004, 1009 (8th Cir. 1990) the court reversed a district court's ruling that the municipal defendant in a § 1983 case need not explain its peremptory challenges against black jurors. Rejecting the city's claim that Batson applied only in criminal cases, the Court of Appeals reasoned that the Supreme Court's explicit choice to go beyond Sixth

Amendment analysis and rest its holding upon the Equal Protection clause of the Fourteenth Amendment, implicitly extended Batson's reach to civil cases at least where the state is a party and can be tied to the discriminatory use of peremptories. Id., at 1008.

> The distinction that is crucial for application of equal-protection principals is that between governmental actors and private actors. The distinction explains the Court's reasoning in Batson far better than the differences between criminal and civil cases. The Batson Court specifically declined to formulate any limit on the exercise of peremptory challenges by defense counsel. If the City's rationale were correct that Batson's applicability depends on the type of case, rather than the governmental affiliation of the party exercising peremptory challenges, then

criminal defense counsel would confront the same limits on their peremptory challenges as prosecutors. The more natural reading of Batson is that its rule of non-discrimination applies only to governmental actors, without distinguishing criminal and civil legal proceedings.

We conclude that the actions of government counsel in purposefully removing black jurors through peremptory challenges violates the Equal Protection Clause, whether the exclusion occurs in a criminal or a civil case.

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Id. (citations omitted).

Of course, the Equal Protection Clause limits state but not private action, and the Eighth Circuit left open the question whether Batson would apply where peremptory challenges are exercised by non-governmental litigants.

Id., n. 2. The rationale of the distinction drawn above concerning criminal defense counsel suggests that Batson should not apply where a private litigant is charged with making discriminatory strikes.[1]

In Edmondson v. Leesville Construction Co., Inc., 895 F.2d 218 (5th Cir. 1990) (en banc), the Court held that a private litigant in a federal civil case, who peremptorily challenged a venire member of the same race as his opponent, is under no obligation to rebut the inference that he struck the juror because of race. The Court concluded that subjecting the use of peremptories to equal protection analysis was inappropriate in such a case because the alleged discriminatory conduct could not be attributed to a state actor. Therefore, the discriminatory conduct fell outside the protection of the Fourteenth Amendment and the holding in Batson. Id., 895 F.2d at 221-22.

In so ruling, the Fifth Circuit rejected an earlier panel opinion that found state action through the judicial oversight and

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[1] At least one commentator has so concluded because use of peremptories by criminal defense counsel cannot not be characterized as state action. Goldwasser, Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry And The Jury In A Criminal Trial, 102 Harv. L. Rev. 808 (1989). An analogous conclusion could be drawn for a private litigant's counsel in a civil case.

administration of peremptory challenges. Edmonson v. Leesville Construction Co., Inc., 860 F.2d 1317 (5th Cir. 1989) ("The government is inevitably and inextricably involved as an actor in the process by which a federal judge, robed in black, seated in a

paneled courtroom, in front of an American flag, says to a juror, "Ms. X, you are excused.'" Id., 860 F.2d at 1313). The ruling also conflicts with the decision in Fludd v. Dykes, 863 F.2d 822 (11th Cir.), cert. denied, 110 S.Ct. 201 (1989), where the Eleventh Circuit upheld a plaintiff's argument that "a district court denies a black litigant equal protection of the laws whenever it permits his adversary--whether the government or a private party--to use a peremptory challenge" to exclude persons who are the litigant's "racial peers." Id., at 824 (emphasis added).

Here, plaintiffs sued both private individuals and the County, which would undoubtedly qualify as a state actor. The attorney for Faulkner County also represented separate defendant Joe Martin, and likely exercised joint responsibility for the strikes. Under those circumstances, state action would be apparent and Batson would

apply because despite counsel's dual role as attorney for a government entity and a private litigant, the County "cannot exempt itself from the Equal Protection Clause simply because its counsel also represented individuals." Reynolds v. City of Little Rock, supra, 893 F.2d at 1009.

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On the other hand, the record of the hearing on the motion for mistrial reveals that the reasons for the strikes were offered by counsel for the Castleberry estate also appeared to take responsibility for the strikes against the two black jurors. If the challenges had been exercised exclusively by the Castleberry estate, then, (assuming the Eighth Circuit were to hold that judicial oversight of the administration of peremptory challenges to be insufficient to constitute governmental action) it would follow that Batson could not apply in this case--not

because of the type of case--but because of the absence of a link between the alleged discriminatory conduct and a party who "may be appropriately characterized as a state actor." Lugar v. Edmondson Oil Co., Inc., 475 U.S. 922, 937 (1982). However, the Court need not reach this question because even assuming Batson does apply, the striking of two black venirepersons by the defendants in this case did not deprive plaintiffs of equal protection.

II.

In Batson, the Supreme Court held that "the Equal Protection Clause forbids [the exclusion of] potential jurors solely on account of their race or on the assumption that black jurors as a group will"favor black litigants". Id., 476 U.S. at 89. The Court outlined a three-step approach in considering a litigant's equal protection claim: First, plaintiffs must show they are members of a

cognizable racial group and that the defendants used peremptory challenges to remove from the venire members of the

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plaintiffs' own race. Id., 476 U.S. at 96. j Second, plaintiffs may rely upon a presumption that peremptory challenges permit "those to discriminate who are of a mind to discriminate," in pointing to any other relevant circumstances from which an inference of purposeful discrimination may be drawn. Id. Third, once plaintiffs have made a prima facie showing of discrimination, the burden shifts to the party exercising the peremptory challenges to come forward with a racially neutral explanation for the strikes. Id.

Plaintiffs here have clearly met the first requirement. As for the second, it must be noted that the gravamen of the complaint is that defendants Martin and Castleberry beat Marvin Williams to death while he was in their

custody in the Faulkner County jail. The defendants were white. Mr. Williams was black. Of particular relevance was the racial climate of the times. Therefore, defendants' strikes against the only two black venirepersons created an inference of purposeful discrimination sufficient to require an explanation for the challenges.

The defendants may not rebut a prima facie case of discrimination by affirming their "good faith in making individual selections", Id., 476 U.S. at 98, or relying on counsel's "assumption--or his intuitive judgment--that [the venireperson] would be partial to [the plaintiffs] because of their shared race." Id., at 97. The defendants must give a 'clear and reasonably specific' explanation of [their] 'legitimate reasons' for exercising the challenges." Id., at 98 n. 20 (citations omitted).

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The plaintiffs may then attempt to demonstrate that the proffered reasons are pretextual. United States v. Wilson, 816 F.2d 421, 423 (8th Cir. 1987).

Responding to the motion for mistrial, the defendants volunteered to offer their reasons for striking the jurors without conceding that Batson required them to do so. Counsel explained first that Mr. Fountain possessed characteristics that "create[d] a picture of instability." They noted that despite having a Master's degree in psychology and past employment as a college professor and minister, Mr. Fountain had been employed for some time and had been a plaintiff in a suit against his former employer. Plaintiffs do not seriously contest the legitimacy of this explanation, and the Court accepts the bona fides of such explanation and concludes that Mr. Fountain was struck for racially neutral reasons. However, plaintiffs contend that the

defendants failed to offer an adequate reason for the use of a peremptory challenge to strike Ms. Veola Sebastian. It is necessary to probe the factual circumstances surrounding the exclusion of this juror.

The plaintiffs' lawsuit, as well as a related criminal investigation, generated substantial media attention prior to trial. During voir dire, the Court asked whether any of the members of the venire had read or seen news accounts about the case. Eighteen of the first twenty-three members of the venire said they had--including Ms. Sebastian. The Court thereafter questioned each of these people individually in chambers to determine whether

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each such juror's exposure to the media's coverage of the case would prejudice that juror for or against either party.

Ms. Sebastian responded to the Court s questioning in a noticeably slow and

tentative manner. The record revealed that she was employed as a factory worker, and her demeanor during voir dire suggested a poor educational background. The trial was expected to last several days, and would include a good deal of testimony and documentary evidence of a forensic pathologist and neurosurgeon. Responding to plaintiff motion for mistrial, defense counsel cited these factors as their reasons for excluding Ms. Sebastian. Finally, the defendants offered to withdraw this strike, but the Court and plaintiffs rejected this offer concluding that replacing members of a jury that had already been seated might have created other concerns for prejudice.

Plaintiffs state that the proffered reason for excluding Ms. Sebastian was pretextual. Relying on the panel decision in United States v. Wilson, supra, plaintiffs contend that the defendants' explanation was

inadequate because they did not demonstrate that they applied comparable assessments to white jurors, who were left on the jury. In Wilson, the panel concluded that the government could not rebut a prima facie case of discrimination if the proffered "reasons for the strikes either apply to both blacks struck and whites not struck, or cannot even be examined to determine comparability." Id., 853 F.2d at 611. Thus, in the present case, plaintiffs argue that the defendants'

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explanation that they struck Ms. Sebastian because she did not appear capable of following much of the testimony was subjective, perhaps applicable to other members of the venire, and therefore inadequate to rebut the inference of discriminatory intent.

It is unclear how much of this comparability test remains. Upon hearing en

banc, the Eighth Circuit explicitly chose not to address the government's explanation for five of the six strikes and focused on a sixth in which comparability was not clearly an issue. United States v. Wilson, supra, 884 F.2d at 1122. The government explained it had exercised the sixth strike against a black venireperson because it and information that the defendant, a prominent black attorney, would attempt to contact jurors and, the government reasoned, would more likely approach a black juror who resided in the same town as the defendant than white jurors who also lived in the same town. Id., 1122-23. The Court concluded that this explanation constituted "a stereotypical racial reason for striking the potential black juror. . ." Id., at 1124. In short, the Court held, the explanation demonstrated that the strike was used because of the juror's racial affiliation, and therefore violated Batson.

Unlike Wilson, the explanation offered by the defendants for striking Ms. Sebastian does not depend on her racial affiliation. If through voir dire, or otherwise, it develops that a particular juror is deficient in the intelligence needed to understand some aspect of the case, then that circumstance will provide an adequate basis for exercise of a peremptory challenge under Batson. Such

assessments are indeed subjective. Yet it is the very essence of the peremptory challenge to allow an attorney to "act on only limited information or hunch" exercising his "intuitive judgment" that a particular juror would be unfit for the case to be tried. Batson, 476 U.S. at 123 (Burger, C.J. dissenting). Batson modifies the breadth of an attorney's discretion to strike jurors by foreclosing as a possible reason for such strikes the intuitive judgment that a

potential juror will favor his client's adversary because of shared racial or ethnic affiliation. Batson does not prohibit subjective assessments of a juror's qualifications when such assessments are based on qualities other than race.

Ultimately, this Court's obligation to determine whether peremptories were exercised for the purpose of intentional discrimination requires a finding of fact. Batson, 476 U.S. at 98 n. 21. Having conducted the voir dire in chambers, on a one-to-one basis, and having had the opportunity to closely observe the demeanor of the jurors, the Court finds that the defendants' proffered explanation was clear and specific and entirely credible. Moreover, it is clear to the Court that none of the other white venirepersons who formed the petit jury exhibited characteristics comparable to those that led the defendants to make their strikes. In sum, the Court does

not find intentional discrimination in the defendants' exercise of peremptory challenges.

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IT IS, THEREFORE ORDERED that the motion for new trial be, and it is hereby, denied.

Dated this 27th day of June, 1990

_____

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RICKY WILLIAMS, et al, the survivors of Marvin Williams — PLAINTIFFS

V. — NO. LR-C-84-791

FAULKNER COUNTY, ARKANSAS, et al — DEFENDANTS

DEFENDANTS' PRE-TRIAL BRIEF

COMES the Defendants and for their trial brief state:

I. STATEMENT OF THE FACTS

On May 5, 1960, Marvin Williams left his pregnant wife, Bonnie, at home while he attended the high school prom at Menifee with his sisters and friends. Joe Flakes will testify that Marvin Williams, along with others, consumed wine and whiskey before they went to the prom.

At approximately 11:30 p.m., the principal of Menifee High School announced that a weather report indicated an approaching tornado and called an end to the prom. Marvin

Williams, along with Joe Flakes, Robert Delph, Robert Oliver and Alan Powell and his wife, left the prom in Williams' car and proceeded west toward Plumerville, Arkansas. The purpose of traveling to Plummerville was to take Alan Powell and his wife home. Upon dropping off the Powells, Williams, Delph, Flakes and Oliver proceeded to the Sunset Cafe in Conway, Arkansas, with Robert Delph driving the Williams' automobile. When they arrived at the Sunset Cafe, Delph and Oliver went inside, while Marvin Williams and Joe Flakes remained in the car.

At approximately 9:00 p.m., Conway Police Officer Marvin Iberg and Chief C.O. Hensley picked up Harvey Macon's son, Curtis, for drunkenness and took him home. The house was located next door to the Sunset Cafe. Upon

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leaving Curtis Macon at the house, Officer Iberg proceeded to take the Chief to his

house. At approximately 12 to 12:15 a.m., on May 6, 1960, the Conway Police Department received a call from Harvey Macon requesting that the Conway Police respond and come to his home and pick Curtis who was drunk and causing problems. Upon receipt of the telephone call, Officers Iberg and Bill Mullenax responded to the call and proceeded to the Macon house. They placed Curtis Macon in the car along with the father and proceeded back to the Faulkner County Jail. Upon arriving at the Faulkner County Jail, the officers took Curtis Macon upstairs and placed him in a cell. Harvey Macon, the father, remained in the police car. After incarcerating Curtis Macon, Officers Iberg and Mullenax proceeded to take Harvey Macon back to his home.

When they arrived back at the Macon home, the Williams' car was parked between the Macon home and the Sunset Cafe. There were a pair of feet protruding from the car and Mr. Macon

requested that the officers remove the occupants, whom he feared were drunk, from the front of his house. Officers Iberg and Mullenax then proceeded to the automobile and found two black youths apparently passed out in the automobile. Marvin Williams had to be physically picked up and assisted to the police car as he was unresponsive. Joe Flakes was awakened and he was able to make it to the police car under his own power. Iberg and Mullenax proceeded to the Faulkner County Jail and upon their arrival, they were assisted by Officer Bill Langford. Officer Langford took Joe Flakes up the stairs and incarcerated him in a cell in the Faulkner County Jail. Officers Iberg and Mullenax assisted Marvin Williams out of the patrol car. They were supporting him and taking him to the building when a strong wind arose and it began to rain very hard. When the wind and rain hit Martin

Williams, he revived briefly, straightened up and the officers relaxed their grip on him. At that time, Marvin Williams suddenly fell forward and the officers were unable to catch him and prevent his fall. The result of the fall was that Marvin Williams struck his head on the courthouse steps. The officers then picked Marvin Williams up and took him inside.

Once inside and in a lighted area, they observed the cut that Marvin Williams had received on his forehead as a result of the fall. The cut did not appear to be serious to the officers and they thereupon escorted Marvin Williams upstairs to be placed in the jail. They met officer Langford coming back down from the jail area and they also met Deputy Sheriff and Jailer Joe Martin on the third floor by his apartment and the officers had a short conversation with Deputy Martin about the impending storm. They thereupon escorted Marvin Williams up to the fourth

floor jail area, whereupon they incarcerated him in the first available cell on the left hand side. Officers Iberg and Mullenax then proceeded back down the stairs, and went back out on patrol.

Approximately 15 to 30 minutes after Marvin Williams' incarceration, Deputy Martin heard a rattling of the cell door coming from the jail area. He proceeded up to the fourth floor whereupon he had a conversation with Marvin Williams. Marvin Williams expressed concern to Deputy Martin that he be let out of jail by j a.m., so that he could be at Ward Body Works by 7 a.m. Deputy Martin responded by informing Marvin Williams that he was a city prisoner and it would be up to city officials to secure his release. Deputy Martin returned downstairs to his apartment and shortly thereafter received a telephone call that a tornado had touched down at

Greenbrier, Arkansas. Deputy Martin thereupon proceeded to Greenbrier where he worked traffic and generally assisted with storm victims.

At approximately 2:30 a.m., Officer Iberg and Chief Hensley returned to jail to check on Marvin Williams and found him sleeping. The purpose of the return was to allow Chief Hensley to check the cut on Williams' forehead and his general physical condition. The bleeding from the cut had stopped, and there was no bleeding from the mouth. Consequently, they decided not to call a doctor.

Deputy Martin returned to the Faulkner County Jail at approximately 7 a.m., whereupon he checked in on the prisoners to see how many he had and how many wanted breakfast. Included in the check was a check on Marvin Williams, who was at that time sleeping. Deputy Martin thereupon went back downstairs and prepared breakfast for those who had

requested same and coffee for those who did not want breakfast. He returned to the jail area and furnished those prisoners with breakfast and coffee. Marvin Williams was still asleep at this time. Deputy Martin heard Williams snoring and observed his breathing. Deputy Martin left the jail area and proceeded about his duties for that day and did not return to the Faulkner County Jail until approximately 9 a.m. He proceeded back up to the jail area where he picked up the breakfast trays and, once again, looked in on Marvin Williams who at that time was still asleep. At approximately 11 a.m., Deputy Martin returned to the jail area and once again checked on the prisoners. This time entering the cell of Marvin Williams. He felt of his pulse, and determined that Marvin Williams was dead. Deputy Martin then proceeded back downstairs and notified the Sheriff, who, in turn, notified the Coroner,

who then came to the Faulkner County Jail.

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A coroner's inquest was called on the afternoon of May 7, 1960, by Coroner R. A. McNutt. A twelve-member coroner's jury heard testimony from Iberg, Mullenax, Martin, Langford, Delph, Flakes, Oliver, Charles Hackney and Lou Cogbill (prisoners in the jail with Williams during the night he died) and every other person from Conway and Menifee who knew anything about Williams' activities on May 5 and 6, 1960. The jury was specifically informed by Coroner McNutt that the cause of death, as reported by the State Pathologist who performed the autopsy, was a fracture to the back of the skull and a resulting hematoma to the brain. The jury recessed at one point for several hours so that some witnesses from the area could be summoned to testify. After hearing all the evidence, and physically viewing the body, the coroner's jury found

that there had been no foul play by the local law enforcement authorities from the time of Williams' arrest until the time of his death.

Defendants' medical proof will show that Marvin Williams' forehead injury was consistent with a fall to the courthouse steps. In addition, Dr. Stevenson Flannigan, chairman of the University of Arkansas Medical Center, Department of Neurology, will testify that the fracture at the base of Williams' skull was, in his best medical judgment, a distant fracture caused by Williams' fall to the courthouse steps. He will also testify that the autopsy and medical reports available from 1960 are consistent with a coup/counter-coup theory of injury to the brain. Testimony from Dr. Alexandrous A. Pappas, a toxicologist at the University of Arkansas Medical Center, will testify that Marvin Williams could have been drunk at the time of his arrest and have dissipated all of the alcohol from his system

by the time of his death.

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Although Plaintiffs allege that Sheriff Joe Castleberry beat Marvin Williams in the jail in the early hours of May 6, 1960, the proof will show that Sheriff Castleberry was at his home until between approximately 4:15 to 4:30 a.m., and will further show that he received a telephone call at home of storm damage and he proceeded to an area east of Guy, Arkansas, which is approximately 20 miles from Conway, Arkansas.

II. Issues

The Plaintiffs have raised five basic issues in their complaint:

1) False arrest

2) Assault and battery

3) Denial of medical treatment

4) Conspiracy to injure Plaintiff's decedent

5) Conspiracy to cover up the manner of

death

The defendants hare responded by filing 12 (b) (6) Motions to Dismiss which have since been transformed into Motions for Summary Judgment and raised the following issues:

1) The applicable statue of limitations has expired.
2) The allegations of conspiracy to cover up the manner of death should be dismissed
3) Punitive damages are not available against the city or county
4) Monell should not have retroactive application
5) The plaintiffs have no standing to sue
6) Respondeat superior is not a proper legal basis upon which to impute liability to the city and county.

The Defendants will not restate the arguments submitted in the briefs, previously filed

herein, but shall, however, submit the following issues for the purpose of this trial brief:

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1) The individual defendants have qualified immunity as a matter of law from any purported liability for failure to provide medical treatment.

2) The individual Defendants, Iberg and Mullenax, had probable cause to arrest Marvin Williams and should have no liability for false arrest.

3) The Defendant Hartje is absolutely immune from any liability because all acts alleged to have been done by him were performed in the course and scope of his official duties as Faulkner County Prosecuting Attorney, or, in the alternative, he is qualifiedly immune from

liability.

4) Faulkner County, Arkansas, can have no liability based on a theory of respondeat superior.

III. THE DEFENDANTS ARE QUALIFIEDLY IMMUNE FROM ANY PURPORTED LIABILITY FOR THE FAILURE TO PROVIDE MEDICAL TREATMENT.

County 3 of Plaintiffs' Complaint contains an allegation asserting that the Defendants should be liable because of their failure to provide medical treatment to the decedent, Marvin Williams. It is the Defendants' position that they are qualifiedly immune from any such liability because they exercised reasonable diligence and case under the circumstances. Furthermore, the law was not well settled in 1960 as to what standard of care was necessary in providing medical treatment to inmates.

in Harlow v Fitzgerald, 102 s. Ct. 2727 (1982), the Supreme Court held that the

reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly establish law, should avoid excessive claims on summary judgment.

> "...the judge appropriately my determine, not only the currently applicable law, but whether that law was clearly established at the time and action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments,

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> nor could he fairly be said to 'know' that the law forbade conduct not previously identified as lawful. Until this threshold immunity question is resolved, discovery should not be allowed." (Id.)

The basis of this allegation contained in the Plaintiffs' Complaint arises out of a

purported Eighth Amendment violation. The Supreme Court clarified in Estelle v. Gamble, 429 U.S. 97 (1976) that Eighth Amendment violations in the area of medical care require at least "deliberate indifference" on the part of prison authorities; inadvertence and negligence are insufficient. It is, thus, the defendants' position that the specific "duty" imputed to police officers and jail officials to provide medical treatment to incarcerated prisoners did not become well settled law until the Estelle v. Gamble decision was rendered in 1976.

In the present case, the facts indicate that after the decedent, Marvin Williams, fell on the courthouse steps, Officers Iberg and Mullenax inspected the decedent's forehead before incarcerating him, but determined at that time that the injury did not appear to be serious. In addition, Officer Iberg notified Chief C.O. Hensley of the incident and

returned to the Faulkner County Jail at approximately 2 to 2:30 a.m., whereupon the chief inspected the injury. On both occasions, the officers determined from the appearance of the injury that it was not of a serious nature. The Plaintiffs assert that Iberg, Mullenax, Martin and Castleberry knew or reasonably had to have known that Plaintiffs' decedent was seriously injured and in need of medical treatment, which they had a duty to provide but knowingly denied him. It is the Defendants' position, of course, that the assertion is baseless and without merit. In fact, the Defendants took reasonable steps to determine the nature and extent of the injury to the decedent's forehead, but were not aware of any overt signs that the injury

was more serious than what it appeared to be. If the Defendants were required to do more, the law in this area did not begin to evolve

until Estelle v. Gamble in 1976. Therefore, it is the Defendants' position that they should have qualified immunity from any allegation that they failed to provide medical treatment.

IV. THE DEFENDANTS, IBERG AND MULLENAX, HAD PROBABLE CAUSE TO ARREST THE DECEDENT.

In Count 1 of Plaintiffs' Complaint, the Plaintiffs allege that the Defendants, Iberg and Mullenax, arrested the Plaintiffs' decedent for public drunkenness. The plaintiffs further assert that at the time of the arrest, the Plaintiffs' decedent was not drunk and Iberg and Mullenax knew it or reasonably should have known it. The Plaintiffs also assert that the decedent was then subjected to a false arrest without probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution. It is the defendants' position

that Officers Iberg and Mullenax had probable cause to arrest Marvin Williams and thus there can be no liability for false arrest.

The objective facts indicate that Marvin Williams had been drinking wine and whiskey on the evening of May 5, 1960. Joe Flakes was with marvin Williams that evening and will testify as to the drinking of alcoholic beverages by the decedent. In addition, Marvin Williams was arrested by Officers Iberg and Mullenax at approximately 12:30 a.m., on May 6, 1960, in front of the Sunset Cafe. Marvin Williams, along with Joe Flakes, gave the officers every appearance of being intoxicated.

In the case of Heslip v. Lobbs, 554 F. Supp. 694 (E.D. Ark. 1982) this court noted:

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> "...police officers do not incur liability merely because a court subsequently acquits the arrestee of the

particular charge cited by the officer (citations omitted). As the court in Pierson reasoned, a policemen must not be forced to choose between charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does." (Id.at page 9)

It is the Defendants' position that they had probable cause to arrest Marvin Williams for Drunkenness. Objective facts clearly point to the reasonableness of the arrest and the Defendants should have no liability therefore. Appendix D-9

V. DEFENDANT HARTJE IS ENTITLED TO ABSOLUTE IMMUNITY.

Defendant George F. Hartje Jr., was the Prosecuting Attorney for Faulkner County, Arkansas, in 1960. The sole allegation of the Complaint as it pertains to Defendant Hartje is contained in Count 5, Conspiracy To Cover

Up, wherein it is alleged by the Plaintiffs that Defendant Hartje conspired with the other defendants to fraudulently cover up the manner of the death of Marvin Williams.

Specifically, Plaintiffs allege that Defendant Hartje coerced Charles Hackney into committing perjury at the Coroner's inquest and failed to present evidence that would have led to a finding of criminal culpability on the part of the police officers.

The depositions of the Plaintiffs, filed previously with this Court, show that there is absolutely no evidence of Defendant Hartje taking any actions outside of his actions as prosecuting attorney in the Coroner's inquest. Appendix D-10

It is the position of Defendant Hartje that he has absolute immunity from liability Appendix D-10

for any acts undertaken in his capacity as a prosecuting attorney. The Supreme Court's

seminal decision is Imbler v. Pachtman, 424 U.S. 409 (1976), which relies on Tenney v. Brandhove, 341 U.S. 367, Pierson v. Ray, 386 U.S. 547, and later cases relating to the immunity of various governmental officials. In Imbler, plaintiff sued a state prosecutor for the alleged knowing use of perjured testimony and the suppression of material evidence at plaintiff's trial which resulted in his conviction for murder. The Court, speaking through Justice Powell, put the issue this way: "Whether a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 U.S.C. § 1983, for alleged deprivations of the defendant's constitutional rights." The Court held the prosecutor absolutely immune. The Court reasoned that prosecutors have always been immune from suit at common law, and those policies underlying common law prosecutorial

immunity apply with equal force to Section 1983 actions.

The Court stated that absolute prosecutorial immunity would not leave the public powerless because prosecutors guilty of misconduct could be punished under criminal law or by disciplinary action. 424 U.S. at 428-429.

Imbler is expressly limited to those activities of a prosecutor which are "intimately associated with the judicial phase of the criminal process,...functions to which the reasons for absolute immunity apply with full force." Id. at 430-431. The decision noted that a prosecutor in the role of advocate frequently acts outside of the courtroom as well as in it, thereby suggesting that this role is quite broad and is protected in its entirety by absolute immunity.

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Since Imbler, it is clear that

prosecutorial immunity from liability for damages attaches to those acts that the prosecutor performs in the role of advocate. For example, immunity protects the prosecutor who allegedly withholds evidence favorable to plaintiff and instructs the witness to testify evasively, if not falsely (Hilliard v. Williams, 540 F. 2d. 220 (6th Cir., 1976) (Per Curiam): and who allegedly improperly has the plaintiff indicated and, at the criminal trial, suborns perjury and files false affidavits (Brude v. Wade, 537 F. 2d. 850 (5th Cir. 1976).

The Issue of the prosecutor's absolute immunity in Section 1983 actions has been more recently developed in Hauptmann v. Wilentz, 570 F. Supp. 351 (D.C.N.J. 1983). The case arose out of the prosecution, conviction and execution of Bruno Richard Hauptmann for the murder of Charles A. Linbergh, Jr., the 20-month old son of the famous aviator, Charles

Linbergh and his wife, the writer Ann Morrow Linbergn, was kidnapped from his home near Hopewell, New Jersey, on the night of March 1, 1932. Charles Linbergh paid $50,000 ransom on April 2, 1932; however, the child was not returned. On May 12, 1932, the remains of a child, later identified as those of Charles A. Linbergh, Jr., were found in a shallow grave. Over two years later, on September 19, 1934, Hauptmann was arrested in New York after passing one of the bills included in the ransom payment. Defendant David T. Wilentz, Attorney General for the State of New Jersey, served as prosecutor during Hauptmann's trial and during all post-trial proceedings. Hauptmann was convicted and executed. Over 40 years after the conclusion of the Hauptmann trial, his widow brought suit against former Attorney General Wilentz, alleging that

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Wilentz coerced a witness not to testify as to

certain facts; that he knowingly presented perjured, false and misleading testimony at trial; that he deliberately withheld exculpatory evidence; that he conspired with defendant Hearst Corporation to deprive Hauptmann of his right to a fair trial; and that he conspired with state police officers who carried out illegal searches and seizures, contaminated the jury, and deprived Hauptmann of his right to privacy and his right to counsel.

Defendant Wilentz countered that the Court should dismiss the complaint against him, pursuant to F.R.C.P. 12 (b) (6), because all the claims against him fall within the zone of absolute immunity afforded to prosecutors by Imbler v. Pachtman, supra. The Court in Hauptmann followed Imbler, reasoning that prosecutors have always been immune from suit at common law, and that the policies underlying common law prosecutorial immunity

apply with equal force to Section 1983 actions. The District Court found that defendant Wilentz had absolute immunity on the claims that he used false, perjured or misleading testimony and concealed exculpatory evidence. 570 F. Supp. at 389. Specifically concerning the allegation that Wilentz had coerced a witness into giving perjured testimony, the Court stated: "Coercing a witness not to testify to an exculpatory fact is one means of withholding exculpatory evidence; thus, Wilentz is absolutely immune from suit on this claim under Imbler." 570 F. Supp. at 377.

There is support for the rationale found in Hauptmann throughout the various district courts and circuit courts of the United States. Thus, in the case of Fullman v. Graddick, 739 F. 2d 553 (11th Cir. 1984), the Court held that allegations of filing an

information without an investigation, filing charges without jurisdiction, filing a baseless detainer, offering perjured testimony, suppressing exculpatory evidence, refusing to investigate complaints about the prison, and threatening defendant with further criminal prosecution were within the absolute immunity recognized in Imbler and could not be the basis for recovery under Section 1983. It was further determined that the prosecutor was entitled to absolute immunity from civil rights actions based upon the prosecutor's alleged conspiracy to withhold evidence and to create improper and perjured testimony in the prosecution of a civil rights plaintiff on charges of capital murder, mayhem and assault in connection with the bombing of City Hall.

In the case of Tate v. Grose, 412 F. Supp. 487 (E.D. Penn. 1976), it was alleged that the prosecutor had conspired to deprive, and had deprived the accused of his

constitutional rights by obtaining and issuing an arrest warrant without probable cause; by maliciously prosecuting a murder indictment; and by knowingly using perjured testimony against the accused. The Court ruled that the allegation that the prosecutor actually solicited perjured testimony did not remove the bar of immunity.

In accord with granting absolute immunity to prosecutors, see Goldschmidt v. Patchette, 686 F. 2d 582, 501 (7th Cir. 1982) (the sending of a letter threatening prosecution was part of the prosecutor's advocate role because it is "not the sort of activity which could be performed by a layman with the same effectiveness that a letter from the prosecutor's office would accomplish."); Lee v. Willins, 474 F. Supp. 970 (E.D. N.Y. 1979) (prosecutors immune from civil rights suit alleging that they force woman into testifying

against plaintiff by arresting her without

cause and threatening to not release her unless she agreed to falsely testify against plaintiff.); Corby v. General Motors Corp. 373 F. Supp. 967 (S.D. N.Y. 1974) (prosecutor absolutely immune in case where plaintiff alleged that prosecutor conspired to obstruct justice by releasing evidence necessary for trial and presenting perjured testimony, court holding the prosecutor's actions arose out of the performance of his duties.); Ney v. California, 439 F. 2d 1285 (9th Cir. 1971) (that deputy district attorney used altered tapes at prisoner's preliminary hearing and trial failed to state a claim under 42 U.S.C., Section 1983.); Heidelberg v. Hammer, 577 F. 1d 429 (7th Cir. 1978) (prosecutor absolutely immune where sued for destroying and falsifying a lineup report and police tapes); Hilliard v. Williams, 540 F. 2d 220 (6th Cir.

1976) (prosecutor absolutely immune from 42 U.S.C., Section 1983 claim based on alleged withholding of certain evidence and presenting deceptive and misleading testimony.); French v. Corrigan, 432 F. 2d 1211 (7th Cir. 1970) district attorney immune in 42 U.S.C., Section 1985 suit alleging conspiracy between himself and defense counsel to falsify statement to the court.); Coffman v. Moss, 420 F. 2d 1270 (3rd Cir. 1970) (district attorney immune from suit alleging conspiracy between himself and three law enforcement officers to use perjured testimony.)

All of the allegations in this case against Defendant Hartje state contentions that he coerced Charles Hackney into giving perjured testimony at the Coroner's inquest, and that he presented this false evidence and failed to present other evidence which could have led to a finding of criminal culpability. All of these alleged actions were in his

official capacity as Prosecuting Attorney. Appendix D-15

All of these actions were of a "quasi-judicial" nature, undertaken in Defendant Hartje's advocate role, and thus satisfy the law set down in Imbler and its progeny.

It is Defendant Hartje's position based upon the authority cited above that he should be afforded absolute immunity for any activities undertaken by him during the course of his preparation for and participating in the Coroner's inquest process. In the alternative, the Defendant Hartje submits that he is surely at least entitled to qualified immunity for any acts undertaken by him as prosecutor in 1960.

VI. FAULKNER COUNTY CANNOT BE HELD LIABLE UNDER ANY THEORY OF RESPONDENT SUPERIOR.

Vicarious liability on the part of the City of Conway and Faulkner County has been previously challenged in motions to dismiss

previously filed. In addition, however, the county submits that the statutory relationship existing in Arkansas in 1960 between a county and its sheriff precludes any liability claim against a county for the acts of its sheriff.

Prior to the adoption of Amendment 55 to the Arkansas Constitution, Section 12 101 et seq, Ark. Stats, Ann., controlled the operations of the sheriff's office. As a constitutional officer (Act 7, Section 46, Arkansas Constitution), the sheriff was elected by the voters of his county and could only be removed for statutory cause.

Sheriff Castleberry was also the exofficio collector of Faulkner County and was paid on a commission basis from his tax collections.

Faulkner County had no control over the selection of deputies. Section 12-106, Ark. Stats. Ann., granted to the sheriff the

exclusive right to appoint deputies. In Parker, County Judge, v. Adkins, 223 Ark. 455, 266 SW 2d 799 (1954), the Arkansas Supreme Court held that the sheriff had the power to select a deputy:

> "It is hard to believe that by Act 53 of 1951 the legislature intended that someone other than the sheriff would have the authority to appoint a deputy sheriff for whose official conduct the sheriff would be responsible. If this were true, conceivably, the sheriff's worst enemy could be appointed as his deputy." (266 SW 2d at 800)

As Sheriff and Collector, Mr. Castleberry was paid in accordance with Ark. Stat. 12-726; so long as he kept the cost of operating his office within the commission limitations of that statute, no other county officer or agency could in any manner control the conduct of the Sheriff's office; not even the power of

the purse string was available since the Sheriff only remitted to the county its net share of the tax collections, after retaining his commission to cover operating costs of his office. Almost concurrently with statehood, the Arkansas Supreme Court held that the sheriff must compensate the deputies from the fees collected by the office (Jefferson County v. Hudson, 22 Ark. 595); the county, as such, had no control or opportunity for control over the sheriff's deputies. The Faulkner County Sheriff's Office was a separate entity, distinct from the county, for employer's tax reporting purposes; it had its own account with the Internal Revenue Service upon which it filed appropriate withholding reports covering employees of the Sheriff's Office, while the county per se, had its own IRS account used for most other county employees.

Simply put, the relationship between Faulkner County and its sheriff was not one of

employee-employer, nor of any other nature by which the Sheriff's activities were subject to control, question or direction. Liability founded upon principles of respondeat superior must, of necessity, be limited to those

situations in which one party has control over the other, which control over the Sheriff's activities was non-existent as to Faulkner County.

Conclusion

For the reasons noted in Defendant's Motions to Dismiss and the foregoing pre-trial brief, the Defendants respectfully request that the Complaint filed against them be dismissed

RESPECTIVELY SUBMITTED,

FAULKNER COUNTY, ARKANSAS, ET AL

BY_____

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RICKY WILLIAMS, individually and as the Administrator of the Estate of Marvin Williams; SHARON WILLIAMS; BONNIE (WILLIAMS) GILBERT; DELAVAH WILLIAMS, JOHNIE WILLIAMS; RONNIE WILLIAMS; EMOGENE WILLIAMS COBIN; ERNESTINE WILLIAMS WEBB; CAROLINE WILLIAMS GILES; VERNA WILLIAMS HAMMOND; BARBARA WILLIAMS GUINN; and DONNA WILLIAMS LOCKHART, the survivors of Marvin Williams	)	No. LR-C-84-791
Plaintiffs,	)	AMENDED COMPLAINT
v.	)	42 U.S.C. § 1981 42 U.S.C. § 1983
FAULKNER COUNTY, ARKANSAS; JAMES T. CASTLEBERRY and JOCILE C. PERRY, co-executors of the Estate of Joe L. Castleberry, deceased; Joe Martin; CITY OF CONWAY, ARKANSAS; MARVIN IBERG, OH.H. (BILL) MULLENAX; and GEORGE F. HARTJE, JR.,	)	41 U.S.C. § 1985 (3) 28 U.S.C. § 1331 18 U.S.C. § 1343
DEFENDANTS.	)	FOURTH, EIGHTH, THIRTEENTH, and FOURTEENTH AMENDMENTS

AMENDED COMPLAINT

The plaintiffs allege against the defendants:

I. INTRODUCTION

1. This action is brought on behalf of the survivors and the estate of Marvin Williams to redress violators of his civil rights when he died in police custody in Conway, Arkansas on May 6, 1960 and because of the conspiracy to cover-up the cause of death. Appendix E-1

II. JURISDICTION AND VENUE

2. This action is brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986 and their jurisdictional predicates, 28 U.S.C. §§ 1331 & 1343 (3).

3. The act complained of occurred in Faulkner County, Arkansas, in this district.

III. PARTIES--PLAINTIFFS

4. The plaintiffs are the survivors of the decedent, Marvin Williams:

(a) Plaintiffs Ricky Williams and Sharon

Williams are residents of Faulkner County, Arkansas. They are decedent's children.

(b) Plaintiff Bonnie (Williams) Gilbert is a resident of the State of California. She is decedent's widow. (She has remarried.)

(c) Plaintiffs Delavah Williams and Johnie Williams are residents of Conway County, Arkansas. They are decedent's parents.

(d) Plaintiff Ronnie Williams is a resident of Conway County, Arkansas. He is decedent's brother.

(e) Plaintiffs Emogene Williams Cobin, Caroline Williams Giles, Verna Williams Hammond, and Barbara Williams Guinn are residents of Missouri. They are decedent's sisters.

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(f) Plaintiff Ernestine Williams Webb is a resident of Michigan. She is decedent's sister.

(g) Plaintiff Donna Williams Lockhart is a resident of Pulaski County, Arkansas. She is decedent's sister.

4A. Also, Ricky Williams is suing as administrator of the estate of Marvin Williams.

IV. PARTIES-DEFENDANTS

5. Defendant Faulkner County and the City of Conway are municipal corporations of the State of Arkansas.

6. Defendants James T. Castleberry and Jocile C. Perry are sued as Co-executors of the Estate of Joe L. Castleberry, deceased for the acts of Joe L. Castleberry during his life. Joe L. Castleberry was a resident of and died in Faulkner County Arkansas on July 8, 1984. James T. Castleberry is a resident of Oklahoma, and Jocile C. Perry is a resident of Florida. Joe L. Castleberry's will was admitted to probate in the Probate Court of Faulkner County Arkansas on July 17, 1984

(case no. P

R 84-110). This action is a claim against the Estate of Joe L. Castleberry. (Hereafter, references to "Castleberry" or "defendant Castleberry" mean Joe L. Castleberry or his estate, as the context requires.)

7. Defendants Joe T. Martin, Marvin Iberg, and George F. Hartje, Jr., are residents of Faulkner County, Arkansas.

8. Defendant O. H. (Bill) Mullenax is a resident of Pulaski County, Arkansas.

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9. At the time of the acts complained of, defendants Iberg and Mullenax were police officers of the City of Conway, and the City of Conway put all its prisoners into the Faulkner County Jail.

10. At the time of the acts complained of Joe L. Castleberry was the Sheriff of Faulkner County. By law, he was the custodian of prisoners. Ark. Stat. Ann. § 12-1110

(since repealed), 46-401 & 46-412.

11. At the time of the acts complained of, Joe Martin was the head jailer and guard of the Faulkner County Jail appointed by Joe L. Castleberry. § 46-402.

V. ACTS COMPLAINED OF

12. In the early morning hours of May 6, 1960, defendants Iberg and Mullenax arrested plaintiffs' decedent and Joe Flakes for public drunkenness and transported them to jail.

13. At the time of the arrest plaintiffs' decedent was not drunk, and Iberg and Mullenax knew it or reasonably should have known it.

14. Plaintiffs' decedent was thus subjected to a false arrest without probable cause in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution.

Count 2--ASSAULT AND BATTERY

15. At the jail, Iberg or Mullenax or

both of them either (a) knowingly and maliciously dropped or knocked plaintiffs' decedent to the ground or steps leading to or

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inside the courthouse leading up to the jail, knowingly causing plaintiffs' decedent physical injury, pain and suffering, emotional distress, and mental anguish, or (b) knowingly and maliciously beat plaintiffs' decedent knowingly causing physical injury, pain and suffering, emotional distress, and mental anguish, or (c) both. This beating could also have occurred before they arrived at the jail or after decedent was in jail or both. If only one acted to harm plaintiffs' decedent, the other stood by knowing an unlawful assault was occurring but failed his duty to plaintiffs' decedent to act to stop it.

16. Plaintiffs' decedent did nothing to warrant being assaulted.

17. Inside the jail, plaintiffs'

decedent was placed in the custody of defendants Martin and Castleberry and incarcerated in the Black section of the segregated Faulkner County jail.

18. After decedent was in the custody of defendants Martin and Castleberry, defendant Iberg returned to the jail with Conway Police Chief Hensley allegedly to check on decedent's injuries. At that time, either Iberg or Hensley beat decedent again or Castleberry and Martin beat decedent or both knowingly causing plaintiffs' decedent further physical injury, pain and suffering, and emotional distress and mental anguish (if he was conscious to begin with). If less than all actually beat plaintiffs' decedent, the others stood by knowing an unlawful assault was occurring but

failed his duty to plaintiffs' decedent to act to stop the other from doing so or acquiesced in or condoned the act.

19. Plaintiffs' decedent did nothing to warrant being assaulted.

20. [Omitted]

21. After the beating in the jail was administered, someone, apparently Castleberry, said: "That ought to take care of that Black son-of-a-bitch forever," and that person directed another, apparently Martin to clean up the area where the beating occurred.

Count 3--DENIAL OF MEDICAL TREATMENT

22. After each of these assaults, Iberg, Mullenax, Hensley, Martin, and Castleberry knew or reasonably had to have known the plaintiffs' decedent was seriously injured and in need of medical treatment which they had a duty to provide but knowingly denied him.

23 After the initial assault, defendant Iberg returned to the jail with Hensley to check on plaintiffs' decedent's condition, and both had to have known or reasonably should have known that plaintiffs' decedent was in

need of medical treatment.

24. These defendants and Hensley left plaintiffs' decedent in his jail cell, and he died in a few hours of a fracture at the base of the skull, an epidural hematoma, and contusion of the brain.

25. The acts alleged in Counts 1, 2, and 3 were the proximate cause of the death of plaintiffs' decedent.

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Count 4--CONSPIRACY TO INJURE PLAINTIFFS' DECEDENT

26. At the time of the acts complained of, the officers of the Conway Police Department and the Faulkner County Sheriff's Office had a de facto policy of abusing arrestees in general and Black arrestees in particular of which responsible person in the City and County were aware but did not prevent when they had a duty to do so.

27. At the time of the acts complained

of, defendant Iberg's superiors know or reasonably should have known that he had a pattern and practice of abusing arrestees in general and Blacks in particular, and the City took no action to control his abuse and racially discriminatory conduct.

28. Defendants Mullenax and Hensley were also aware of Iberg's propensities but took no action to limit Iberg's actions. Both stood by and watched what happened or they participated at one time or another in the beating, thus acquiescing in it.

29. AT the time of the acts complained of, Castleberry and Martin both had a pattern and practice of abusing arrestees in general and Blacks in particular, each was aware or reasonably should have been aware of their propensity, and neither took any action to limit the abuse and racially discriminatory conduct of the other.

30. Castleberry, Martin, Iberg, and

Mullenax combined and conspired either tacticly or overtly to knowingly (a) arrest and cause plaintiffs' decedent to be jailed without probable cause, (b) assault and injure or kill plaintiffs' decedent without

justification, and (c) deny him medical treatment after his assault. If they did not initially conspire, they joined the conspiracy knowing the objectives of it and the past occurrences. Shortly thereafter, they conspired to give a false account of the manner of plaintiffs' decedent's injury and, later, death [count 5].

31. Because these defendants entered into a conspiracy to harm plaintiffs' decedent, each became legally liable for the acts of the others in the course of the conspiracy.

32. This conspiracy was also a proximate cause of the plaintiffs' decedent's death.

Count 5--CONSPIRACY TO COVER-UP THE MANNER OF DEATH

33. In 1960, defendant Hartje was the elected Prosecuting Attorney of Faulkner County's judicial district.

34. The morning of May 6, 1960, defendant Hartje entered the jail area and inquired as to whether any prisoners saw anything. Prisoner Charles Larone Hackney said that he did.

35. Later that morning, Castleberry or Martin or both removed or caused to be removed Hackney from his cell and took him to another room where they met with defendant Hartje. Hartje told Hackney (in effect): "You didn't see a God-damned thing, you didn't hear a God-damned thing, and you don't know a God-damned thing. If you want out of my jail, you'll say as you're told."

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36. That night, Hackney was told by a

co-conspirator whose identity is presently unknown, that if Hackney talked about what he saw, he "would go out the same way."

37. The next day, a coroner's inquest was called by R. A. McNutt, Faulkner County Coroner, pursuant to Ark.Stat.Ann. § 42-301 et seq.

38. Defendant Hartje participated in the inquest as Prosecuting Attorney in summoning coroner's jurors and in examining witnesses.

39. Castleberry, Hackney, Martin, Iberg, Mullenax, and others testified at the inquest.

40. The officers testified that plaintiffs' decedent was arrested for being drunk and that he was stuporous when removed from the patrol car at the jail by defendants Iberg and Mullenax, They also testified that plaintiffs' decedent "come to" and fell forward onto the steps outside the courthouse injuring his head, and he must have died from that. This was false testimony and the co-

conspirators all knew it.

41. Because he was threatened by co-conspirators, Hackney testified that he did not see anything but only heard plaintiffs' decedent's moans from the Black section of the jail.

42. An autopsy was sought the day before the Coroner McNutt, but, as a part of the conspiracy, the complete results were not sought by nor given to the coroner's jury even though available. Neither was the pathologist

who performed the autopsy, Dr. Charles O. Fox, called to testify at the inquest. He would have testified the death was from a direct blow from a billy club or other instrument to the back of the head and that decedent's blood alcohol level was negative.

43. [Omitted]

44. Hartje, Castleberry, Martin, Iberg, Mullenax, Hensley, and McNutt combined and

conspired tacticly or overtly to knowingly provide a false account of the manner and cause of plaintiffs' decedent's injury and death prior to, in testimony before, and after the coroner's inquest in order to protect those responsible for the death and conceal the true manner and cause of death. Thus, there is no immunity associated with a quasi-judicial proceeding.

45. Because these defendants expanded the original conspiracy to injure plaintiffs' decedent into one to cover-up the cause of plaintiffs' decedent's injuries and manner of death, each became liable for the acts of all the others from the beginning of the conspiracy.

45A. A part of the conspiracy was to produce a quick resolution on the question of police fault in the death of decedent because the conspirators were generally aware of the racial climate at the time which would

effectively bar plaintiffs from pursuing the truth or any claim.

45B. Plaintiffs Delavah and Johnie Williams diligently pursued the true facts to the extent the racial climate of 1960 Faulkner County allowed. They sough legal counsel, who

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told them it would be pointless to pursue a further investigation.

45C. Because they had neither the financial nor social means of investigating the death, they could not penetrate the cover-up devised by the defendants' conspiracy.

46. This combination and conspiracy successfully concealed this cause of action until 1984 when Hackney made it public and scientific evidence surfaced which corroborated his statements.

47. Because an object of this conspiracy was to knowingly fraudulently conceal the manner and cause of plaintiffs' decedent's

death, the statute of limitations has been tolled as to all defendants.

VI. STATUTORY AND CONSTITUTIONAL VIOLATIONS

48. The acts of defendants Castleberry, martin, Iberg, Mullenax, and Hartje were done under color of state law with the intent to violate plaintiffs' decedent's civil rights protected by 42 U.S.C. § 1983:

(a) to be free from unlawful arrest protected by the Fourth and Fourteenth Amendments to the United States Constitution (Count 1);

(b) to not be subjected to an unjustifiable assault and cruel and unusual punishment by law enforcement officers protected by the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution (Count 2);

(c) to be provided reasonable medical treatment for his injuries while in

custody protected by the Eighth and Fourteenth Amendments to the United States Constitution (Count 3);

(d) to substantive due process of law and the privileges and immunities of citizens protected by the Fourteenth Amendment to the United States Constitution (Counts 1, 2, and 3);

(e) to be free from their conspiracy to falsely arrest him, subject him to unlawful assault and battery, and deny him medical treatment in violation of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution (Count 4);

(f) to be free from their conspiracy to cover-up the manner, cause, and responsibility for his death protected by the due process, privileges and immunities, and equal protection clause of the Fourteenth Amendment to the United

States Constitution (Count 5).

48A. The acts of the defendants were done under color of state law with the intent to violate plaintiffs' civil rights protected by 42 U.S.C. § 1983:

(a) The rights of Delavah and Johnie Williams to enjoy a parent-child relationship with their son without state intrusion or interference, a liberty interest protected by the Fourteenth Amendment to the United States Constitution.

(b) The rights of Rickey and Sharon Williams to a father's love,

companionship, and support without state intrusion and interference, a liberty interest protected by the Fourteenth Amendment to the United States Constitution.

(c) The rights of Bonnie Williams Gilbert to the love, companionship, consortium, and support of her husband without state intrusion and interference, a liberty interest protected by the Fourteenth Amendment to the United States Constitution.

(d) The rights of Ronnie Williams, Emogene Williams Cobin, Caroline Williams Giles, Verna Williams Hammond, Barbara Williams Guinn, Ernestine Williams Webb, and Donna Williams Lockhard, to the love and companionship of their brother without state intrusion and interference, a liberty interest protected by the Fourteenth Amendment to the United States Constitution.

49. The acts of these persons were also

racially motivated (because plaintiffs' decedent was Black) and under color of state law in violation of 42 U.S.C. §§ 1981, 1982, 1985 (3), and 1986 and the Thirteenth and Fourteenth Amendments to the United States Constitution.

VII. LIABILITY FOR ACTS OF OTHERS

50. Each of these individuals willingly joined this conspiracy. Therefore, each is jointly and severally liable for the acts of the other co-conspirators even occurring before the conspiracy was joined or after they left it because they did not reveal or otherwise repudiate the conspiracy with a purpose to end it and reveal its purposes.

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51. Under 42 U.S.C. § 1981, Faulkner County and the City of Conway are liable under principles of respondeat superior for the racially discriminatory acts of their officers, employees, or agents done under

color of law.

52. Under 42 U.S.C. §§ 1983, 1985 (3), & 1986 responsible parties of the City of Conway and Faulkner County were aware of the propensity for Officer Iberg, Sheriff Castleberry, and Jailer Martin for abusing arrestees in general and Blacks in particular before the death of plaintiffs' decedent, and no action was taken to correct this situation when they had a duty to do so. Also, Chief Hensley was directly involved. This constitutes a failure to supervise or train or both. Thus, the County and City also have direct liability.

53. Under Ark.Stat.Ann. §§ 12-1101 et seq, 46-402, 46-412, 46-511 & 46-701, Castleberry, Faulkner County, Hensley, and the City of Conway had a duty to provide a safe jail, and they are liable for any acts which occur in the jail.

54. [Omitted]

55. The co-executors of the Estate of Joe Castleberry are sued because the estate of Joe Castleberry is liable.

VIII. PRAYER FOR RELIEF

56. Plaintiffs have been damaged in the amount of two million dollars in compensatory damages for the conduct of all defendants and Castleberry alleged herein: (a) for the decedent's unlawful arrest, beating, denial of medical treatment, physical injuries, pain and

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suffering, intentional infliction of emotional distress, and mental anguish before death, (b) for their loss of love, companionship, society, consortium, and financial support of their father, husband, son, and brother, and (c) the estate of Marvin Williams should recover for decedent's loss of life and the enjoyment thereof ("hedonic damages").

57. Plaintiffs have further been damaged in the amount of two million dollars in

compensatory damages for the conduct of all defendants and Castleberry and those acting in concert with them in conspiring to cover-up the manner, cause and responsibility for plaintiffs' decedent's death.

58. Defendants and the Castleberry estate should further be assessed punitive damages assessed in the jury's discretion for the defendants' willful, wanton, and malicious conduct in killing plaintiffs' decedent or covering up the manner, cause, and responsibility for his death or both. The nature of the claim makes Fact Concerts inapplicable.

59. Plaintiffs should further be awarded their costs, reasonable attorney's fees and reasonable litigation expenses under 42 U.S.c § 1988, and any other appropriate relief.

60. Plaintiffs demand a jury trial.

Respectfully submitted,

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-and-

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by _____
John Wesley Hall, Jr.

Attorneys For Plaintiffs

CERTIFICATE OF SERVICE

I, John Wesley Hall, Jr., swear that I have served this pleading on the attorneys of record in this case by U.S. Mail on the 4th day of April, 1985.

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John Wesley Hall, Jr.

Appendix E-16

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RICKY WILLIAMS, et al PLAINTIFFS

v. No. LR-C-84-791

FAULKNER COUNTY, ARKANSAS, et al DEFENDANTS

MEMORANDUM AND ORDER

For the reasons stated by the Court on the record during the after the oral argument held on April 30, 1986, and for the additional reasons stated below, the combined motions to dismiss and motions for summary judgment (based on the statue of limitations) of the defendants Faulkner County, the Estate of Joe L. Castleberry, Joe Martin and George F. Hartje are hereby denied and the same motions filed on behalf of the defendants City of Conway, Arkansas, Marvin Iberg and O. H. (Bill) Mullenax are hereby granted.

According to the Court's analysis of the undisputed evidence, the only fraudulent

concealment by any of the defendants relates to the testimony of Charles Hackney. The Court has found that all of the other evidence upon which the plaintiff will rely in the trial of this cause was readily available to the plaintiffs between May 6, 1960 and May 6, 1963, i.e., during the statute of limitations period.

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The Court has concluded that the plaintiffs have evidence from which a reasonable jury could find that the defendants Castleberry, Martin and Hartje conspired to cover up and conceal evidence of castleberry's and Martin's involvement in an assault on Marvin Williams. The Court has also concluded that, under all of the facts and circumstances, the plaintiffs did not lack due diligence simply because they did not contact Mr. Hackney before May 6, 1963, to make some independent inquiry about his knowledge of the

facts. The plaintiffs first learned in 1984 that Mr. Hackney claimed that he witnessed an assault upon Marvin Williams by the defendants Castleberry and Martin on May 6, 1960.

The plaintiffs argue that the defendants Iberg and Mullenax have also fraudulently concealed the truth by, in effect, not admitting that they assaulted the deceased. In other words they believe those defendants to be lying. But it is undisputed that plaintiffs have disbelieved all of the defendants from the date of Marvin Williams' death. If the statute of limitations is to have any effect at all in cases of this nature, that defense cannot simply converted into a jury issue based solely upon the contention that a part of parties are lying (and thereby fraudulently concealing) and, arguably, that therefore the lawsuit can be brought at any time. The reason is that the same evidence that the plaintiffs would rely

on at some trial being conducted after the running of the statute - that is, that the party or parties are lying about their involvement - that same evidence would have

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been available, and the same trial could have been conducted, prior to the running of the statute of limitations. To toll the statute, evidence concealed by the fraud must surface after the statute of limitations has expired.

To illustrate, let us use the facts of this case but assume that Mr. Hackney had not, years later, recanted his testimony before the coroner's jury. In that situation, could the plaintiffs argue that all of the defendants and the defendant's witnesses were lying about their involvement - and thereby fraudulently concealing evidence - and that, therefore, the plaintiffs could bring their cause of action at any time - 20, 30 or 40 years after the event? The answer is clearly that they may

not. And the reason is that the plaintiffs have the same evidence available to them before the running of the statute of limitations as they do after the expiration of that period. The plaintiffs respond that we are not simply arguing that defendants Iberg and Mullenax were lying; they say they have extrinsic evidence that they were. That evidence is the autopsy or coroner's report stating that there was no alcohol in the blood of the deceased. And since the deceased was allegedly arrested for intoxication (according to the defendants Iberg and Mullenax), plaintiffs argue that a jury would have good reason to find that Iberg and Mullenax were lying. With that predicate, plaintiffs go on to argue that the jury, from other circumstantial evidence, could then find that those defendants actually assaulted and beat

the deceased and were responsible for his

death.

Conceding for the purpose of argument only that such inferences could be drawn from a jury's conclusion that the defendants Iberg and Mullenax were lying about the grounds for arrest and apprehension of the deceased, the argument nevertheless avails the plaintiff nothing. The reason is that the autopsy and coroner's report were readily available to the plaintiffs within a very short period after the death of Marvin Williams and long before the statute of limitations ran in 1963. Therefore, the evidence which the plaintiffs would present to the jury at a trial in 1986 would have been the same evidence that they could have presented to a jury if the trial had been held prior to May 6, 1963.

So for fraudulent concealment to toll the statute, the fraud must be discovered and some concealed evidence revealed after the expiration of the statutory period. j That was

the situation in the Bell case. This leads us to a consideration of the effect of the recantation of the witness Hackney.

It must be clearly understood that Hackney testified in 1985 at the criminal trial of Iberg and Mullenax (consistent with statements that he had given press and media coverage in 1984) that he observed the defendants Castleberry and Martin bring a person, later identified as Marvin Williams, up the stairs in front of his cell. He testified that he observed their drooping Marvin Williams and also beating him with blackjacks, administering some ten blows, and

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then dragging him off to a cell where he heard other blows administered.

Hackney was shown photos of Iberg and Mullenax and Chief Hensley and clearly testified that those persons were not the ones he observed with Marvin Williams. So the testimony that

the plaintiffs now have that they probably could have had[1] prior to May 6, 1963, is the testimony of a witness who claims that he saw defendants Castleberry and Martin beat marvin Williams. Assumedly, if that testimony had been available prior to May 6, 1963, it would have helped, not harmed, the defendants Iberg and Mullenax. Although it can be argued that Iberg and Mullenax, city police officers, may have had some interest in covering up the acts of the sheriff and his deputy, Martin, in order to protect the latter, that coverup was not for their benefit in regard to the charge made by the plaintiffs that Iberg and Mullenax had beaten the deceased.

There is nothing in the submissions of the parties that the Court can find that would permit the conclusion by a jury that Iberg and Mullenax participated in the conspiracy after the death of Marvin Williams to cover up the testimony of Hackney relating to the

involvement of Castleberry and Martin.

The reason that the Court has concluded that the statute of limitations has been tolled, with respect to the Court has concluded that the statute of limitations has been tolled, with respect to the plaintiffs,'

---

[1]Of Course, defendants argue that plaintiffs could have obtained this testimony before running the statute of limitations had they exercised reasonable diligence in contacting Mr. Hackney after he was free from any coercive influence of the defendants, i.e., after the criminal charge against him had been disposed of and he had left the county. For the reasons stated from the bench, the Court disagrees.

claims against Castleberry and Martin, is found in the testimony of Hackney that the prosecutor, Hartje, and the sheriff, Castleberry, after allegedly having been told the truth by Hackney about Castleberry's and Martin's involvement, threatened and coerced Hackney not to reveal that information before the coroner's jury. And in 1984, Mr. hackney

recanted the testimony that he gave before the coroner's jury. So, consistent with Bell the evidence fraudulently concealed has been discovered, the hidden evidence revealed, and therefore the statute of limitations has been tolled with respect to the claims of the plaintiffs against the defendants Castleberry, Martin, and Hartje.

It should be pointed out that there is no claim that Hartje was in any way involved in the conspiracy to arrest, assault or otherwise harm Marvin Williams. His involvement is alleged to have commenced after the death of Marvin Williams. Therefore there is only the concealment-conspiracy cause of action against the defendant hartje.

It is necessary to comment on an additional argument of the plaintiffs and that is that they should be excused (by the tolling of the statute for not pressing their claims because of the racial climate allegedly

prevailing in Arkansas during the early '60's. They point to the poignant testimony of Marvin Williams' father, for example:

Q Who was going to -- who was going to hurt you and your children if you had done anything about -- gone any further with your son with -- in investigating your son's death?

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A I don't know just who, but you know how it was back in 1960? A black man's word didn't mean a thing.

Q Well, you know, I -- you told us a few months ago that you were afraid, that you were scared?

A I -- yes, I was, because they killed -- my son had been killed.

Q Who killed your son?

A I believe the law officials at -- from the Sunset Cafe over here -- over here to the courthouse -- some

of the officials that had him in custody did something to him.

***

Q Who was going to hurt you back in 1960 had, had you gone forward with this investigation?

A I don't know who, but back -- like I said, the instance in '57, you know, they had to get -- the President had to get troops, troop soldiers to send to Little Rock to -- for eight kids to go to school. You remember that?

Q Yes sir?

A And if they were -- you had to get troops for kids to go to school, what would you have to get if you protest about somebody killing your son? I feared for the life of my family.

Q Had any member of your family ever

been abused by any local -- any Faulkner County or Conway County -- City of Conway police officers?

A Not to my knowledge -- but my son. [D. Williams at 59-61]

****

Q Mr. Williams, now lets, lets take this thing one step at a time because -- you had told us that the reasons you didn't take any action in this matter in 1960, when you believed that Marvin had been killed by somebody, was the fact that you were frightened?

A I said I was feared for my kids, my family.

Q All right sir. Now,I'm asking you, in 1970 were you still afraid for your family?

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A Well I had just put it out of my

mind because I didn't have anything to work on.

Q Mr. Williams, now, I want you to answer my question, please, sir. In 1970 were you still frightened for your family?

A Well, I would say, yes.

Q In 1975 were you still frightened for your family?

A I didn't have anything to work from, mister.

Q Mr. Williams, in 1975 were you still frightened for your family?

A I still didn't have anything to work on until 1984 -- till these reports come out, and this man...

Q I, I realize that, -- that's not what I'm asking you. What I'm asking you is, whether or not you were frightened for your family?

A Well yes, I was, I was still

frightened for my family. I was -- you know, you -- you know, yourself.

Q Well what -- who are you frightened of?

A Well the abuse that blacks sometime gets. It's still going on. Id. at 75-77]

****

Q Okay. Tell us, if you could -- this is a tough question, but tell us if you could, what it was like to be black in 1960 in this area?

A Well, it was really rough to be a black man, because everywhere you went you were second -- on the bus, on the job, the schools, and everywhere else. And your word didn't mean a thing in 1960. You just didn't dispute what a white man said.

Q Now, Conway in 1960, did they have

colored and white water fountains?

A No, you don't drink out of -- yeah, they had different fountains. One for black, and one for the white.

Q Were blacks allowed to go into restaurants?

A No. Train stations either.

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Q Hotels?

A No, you didn't go to -- huh-uh (negative), no, unless you were the bell boy, you know, toting suitcases or something like that.

Q If you were to tell anybody about what you thought happened to Marvin, do you think anybody would believe you?

A Back in '60?

Q Right?

A No, that'd just went in one ear, and come out the other. [Id. at 92-93]

There are various problems with this argument even if one accepts the factual basis therefor. First, the then adult members of the Williams family did pursue the matter in 1960-1963 period. They had at least two lawyers look into the matter. They had a doctor make an independent examination of the body of Marvin Williams. They noted the physical injuries and took photographs of the body. The inference is that they did not pursue the matter because their lawyer reported finding no basis to proceed. The argument is put forth as bearing upon the issue of plaintiffs' diligence in pursuing and investigating their possible claims. But plaintiffs' diligence is only one of the requirements for tolling. Before the Court may decide that the statute should be tolled it must also have evidence that the defendant's conduct is responsible for the plaintiffs' being unable to bring their case

within the statutory period. Ordinarily this requirement is stated in terms of the defendant's fraudulently concealing needed evidence. But even if one states it more broadly, how many one legitimately hold the defendants here responsible for the racial

climate allegedly prevailing in Arkansas in 1960-63? And this Court does not believe it can be accepted through judicial knowledge that blacks could not have gotten a fair trial in federal court on their Section 1983 claims during the years 1960-1963.

And the "racial climate" argument, if it is intended to relieve black plaintiffs of the duty of ordinary diligence and of the duty to fix responsibility for their delay in bringing the action upon the acts of the defendant or defendants, cuts entirely too far. It would suggest that all such claims by blacks should never be time barred because of the racial

climate prevailing since the enactment of Section 1983 until such time as courts could certify the absence of such a racial climate. Would that point have come in 1950, 1960, 1970 or 1980? Indeed, although the plaintiffs wish to pursue their 1960 cause of action in 1986, Mr. Williams believes racial prejudice is "still going on". And he may be right. Such a rule could encourage the initiation of thousands of decades-old cases. Perhaps that would be a good, just and salutary result. But such a policy determination should not be made by judicial fiat.

This Court believes strongly that statutes of limitations are public policy decisions that should be established by the Legislative Branch of our government. Absent some different pronouncement by that branch, the courts should determine tolling issues in keeping with established precedent.

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All of the defendants claim that the statute of limitations has run and that there was no fraudulent concealment which would cause the statute to be tolled. If they are right, the case should stop now before they are put to the expense and trauma of a trial. By the same token, the plaintiffs strongly urge that the statute has been tolled with respect to all the defendants and that the fraudulent concealment issue is for the jury to decide. They are concerned that the jury may not believe Mr. Hackney and they urge that if the jury did disbelieve him, it might then determine that Iberg and/or Mullenax were responsible for the death of Marvin Williams. It is therefore, extremely important to all of the parties to this action to finally resolve the statute of limitations issues at this point in this proceeding

Title 18 U.S.C. § 1292 provides in part:

(b) When a district judge, in making

a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge

thereof shall so order.

This Court is of the opinion that its Order granting and denying the various defendants' motions to dismiss/motions for summary judgment as set forth above involves a controlling question of law as to which there

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is substantial ground for difference of opinion. It is this Court's further opinion that an immediate appeal from said order may materially advance the ultimate termination of this litigation.

It is therefore Ordered that the combined motions to dismiss and the motions for summary judgment (based upon the statute of limitations) of the defendants Faulkner County, the estate of Joe L. Castleberry, Joe Martin and George F. Hartje be, and they are hereby denied.

It is further Ordered that the combined motions to dismiss and motions for summary

judgment (based upon the statue of limitations) of the defendants, City of Conway, Marvin Iberg and O. B. (Bill) Mullenax be, and they are hereby, granted, and the case dismissed as to said defendants.

It is further Ordered that the parties hereby may apply to the Court of Appeals for the Eighth Circuit to permit an appeal to be taken from this Order provided applications therefor are made within ten (10) days after the entry of this Order.

It is further Ordered that if such an application or applications for appeal is, or are, made within ten (10) days after the entry of this Order, then, and in that event, all proceedings in this matter in the District Court shall be stayed pending disposition of such applications in the Court of Appeals.

Dated this 12th day of May, 1986.

UNITED STATES DISTRICT JUDGE
Appendix F-12

Inquiry Finds New Facts In Death in Conway Jail - July 15, 1984 issue of Arkansas Democrat

Conway - An Arkansas Democrat investigation into the case closed last month by the FBI has turned up evidence that a young black man likely died of a bludgeoning rather than from a fall while in the Faulkner County Jail 14 years ago.

Marvin Williams of Menifee, was 21 when he was found dead of a "concussion" in a cell on the morning of May 6, 1960. Two Conway police officers had arrested Williams a few hours earlier for being "very drunk" in a parked car on Markham Street in Conway.

At a hastily called coroner's inquest that began about noon on the same day, Officers O. H. Bill Mullenax and Marvin Iberg testified they had found Williams in the car and taken him and a friend, Joe Flakes, to jail at the Faulkner County courthouse.

The policemen described williams as being

in a stuporous condition as he regained consciousness, he stumbled on the wet side of the courthouse steps and fell forward, striking his forehead above the right eye, according to accounts of the Conway Log Cabin Democrat.

After four hours, the 12 white men who comprised the coroner's jury ruled William's death as accidental, apparently without studying the results of an autopsy conducted at 3:00 p.m. that same day at the University of Arkansas Medical Center. The postmortem was conducted by Dr. Edward O. Fox, who now lives in New Jersey.

Mullenax, who later became Conway police chief before joining the Arkansas State Police in 1963 recently told the Democrat that he remembered the incident pretty much as news accounts had described it. He said he was "sure" that Williams drunkenness had prompted the arrest.

Iberg now a freight truck driver out of Little Rock said earlier this week that he couldn't remember much about the incident except that he never saw Williams abused.

However, an eight week inquiry by the Democrat has revealed that Williams died from severe head injuries caused from a direct blow behind his left ear. The blow was so powerful that it literally split his skull almost half way down the back side of his head, medical records show. A superficial injury to Williams' right forehead that was reportedly suffered in the alleged fall was considered minor. But an unnamed Conway physician was quoted at that time by then prosecutor George Hartje, Jr., (now circuit judge) as saying that the obvious bruised and swollen area behind Williams' left ear could have somehow been caused by the minor injury to his forehead.

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Marvin Williams' blood tested negative for alcohol content at the University of Arkansas Medical Center, according to the autopsy report and a separate report signed by Dr. Lloyd D. Seager, chairman of the department of Pharmacology. These findings were never presented at the inquest, the Democrat learned from interviews.

Dr. Fox, who performed the autopsy on Williams on May 6 at 3 p.m., said his findings showed Williams had been struck forcefully behind the left ear with some instrument. Fox said the indentation in Williams' skull from the blow was clearly definable. Three other medical experts also examined Fox's findings at the request of the Democrat and concurred the injury was from a blow. Dr. Fahmy Malak, the state's chief medical examiner, is currently reviewing the case at the request of prosecutor William C. Brazil of Conway.

Charles Hackney, an inmate at the

Wrightsville Unit of the Arkansas Department of Correction, serving time for his sixth conviction, said he was incarcerated in the Faulkner County Jail on May 6, 1960, and witnessed Williams being beaten by two officers in civilian clothes.

Hackney provided the Democrat with a sworn statement in May in which he described Williams as being dragged into a cell out of his view and being beaten after he had already been struck at least 10 times in Hackney's sight about 2 a.m. on May 6.

He also said he was taken into a small room in the courthouse later that morning and threatened by two county officials who ordered Hackney to lie at the inquest about what he had seen. Hackney said he followed their instructions. Last week he agreed to take a polygraph about the statement if others would also agree to such a test.

Hackney said two FBI agents interviewed

him in 1961 about his version of the incident but the federal investigation never developed. Hackney said last week that he had left the Faulkner County Jail shortly after the inquest, and had not heard the story about Williams' alleged fall on the steps until March 10, 1964, when another inmate informed him.

He said that revelation prompted him to begin writing state and federal officials about what he alleged had witnessed.

James T. Blasingame, director of the FBI in Arkansas, Tuesday confirmed the U.S. Department of Justice "closed" its most recent inquiry into the Williams case more than a month ago on June 21, following what he termed a "limited investigation". He added that the case could be reopened if new evidence surfaced which indicated a federal crime had been committed.

While Blassingame would not elaborate,

the Democrat learned that the two week FBI inquiry into Williams' death consisted primarily of interviewing Hackney and some other youths who had been with Williams the night he died. The FBI apparently never obtained a copy of the autopsy report during their investigation according to sources. Fox said he had never been interviewed by police or the FBI about his autopsy.

Also, the FBI had already wrapped up its investigation of the Williams case on the same day the local office was just acknowledging receipt of Hackney's June 3 letter to them. In a form letter dated June 21, the Little Rock FBI office told Hackney that his letter about William's death was being forwarded to the Assistant Attorney General for Civil Rights in Washington.

The May 6, 1960 inquest held at Conway City Hall was under the direction of former Faulkner County Coroner Robert A. McNutt (now

deceased) and then-prosecutor Hartje.

The group was impaneled within five hours of the time Deputy Sheriff Joe Martin reportedly discovered Williams' lifeless body alone in a cell. Joe Castleberry, the Faulkner County sheriff at that time attended the inquest. Joe Castleberry died two weeks ago.

Raymond Kordsmeier, of Conway, a member of the coroner's jury, said several witnesses testified Mullenax and Iberg had handled Williams and Flakes "gently" when they took them from their parked car in front of the Sunset Cafe on Markham Street for public drunkenness. But family members said one of Williams' shoes was found in the car the next day.

Apparently no member of the inquest ever read the autopsy report which included the findings that no alcohol had been detected in Williams' blood.

Cecil Bell, of Conway, another member of the jury, also said he could not recall seeing the autopsy report. "I just don't remember," he said. No transcript or records from the inquest have been located.

Hartje said he did not believe members of the jury ever saw the autopsy results before drawing their conclusions about Williams' death.

"I don't think it was (shown to the inquest) but I have no way of knowing." he said. In fact, Hartje indicated he had just seen the autopsy report for the first time earlier this month.

William's death certificate, which was signed May 19, 1960, by McNutt -- presumably after the autopsy findings had been forwarded to him as coroner-- stated: "This party had been drinking and was so intoxicated they didn't know what happened."

Ronnie Williams, 31, of Menifee, said he

could not understand how the coroner put such a notion on his brother's death certificate when the blood alcohol test was negative.

Other witnesses have told the Democrat that Williams had not been drinking on the night he died.

"I wonder if anyone but only a few people in Conway ever saw the autopsy results," said Williams. "We didn't even know there was an autopsy report anywhere until a reporter called last month and asked if the family would help him obtain it."

Ronnie Williams initially asked the McNutt Funeral Home in Conway for the autopsy in early July. At first, he said he was told the report had been forwarded to Hartje's office. But when Williams then requested the report in writing, the funeral home located the report in old coroner files.

The family then made the autopsy report available to prosecutor Brazil at the

suggestion of a reporter. Brazil, the son-in-law of former Circuit Court Judge Russell Roberts of Conway, said he had never seen an autopsy until that time.

McNutt also made other significant errors on Williams' death certificate: The date of death is listed as May 5 when Williams died on the morning of May 6, records show; The manner (homicide, suicide, accident) was left blank; the interval between the incident and Williams' death was listed as 12 hours, which was never proven, and the certificate states

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Williams was not a veteran when in fact, he had served with distinction as an U. S. Army paratrooper.

Details of Williams' autoporous falling incident are sketchy, derived mainly from stories published in the May 7 and May 9 editions of the Conway newspaper.

The May 7 paper says Conway patrolman

Bill Langford had been summoned from the police station to assist Mullenax and Iberg after they had arrived at the jail with the two black men. Langford allegedly took Flakes up the stairs, and "meanwhile", the story said " Iberg and Mullenax were attempting to remove Williams from the patrol car and get him to stand without assistance.

The officers told the story of Williams' alleged fall from that point the paper reported:

It was raining and the wind was blowing and when it became evident Williams had come to enough to stand up without our help, we loosened our grip on him. He fell forward and before we could grab him his head struck the step on the west side of the courthouse," the officers were quoted as testifying.

Later in the night, after Williams was placed in the cell, Deputy Martin, the jailkeeper (who was later elected sheriff of

Faulkner County) said Williams cried out that he had to be at work in a few hours and asked someone to call his father, who would make bail.

Martin, who hung up on reporter's questions last week said in a face-to-face interview this week that he had not placed Williams in the cell because he had been out of the jail most of the night due to a bad storm in the area. Martin said other unnamed officers had locked Williams in the cell.

The Old Conway newspaper accounts said Martin had discovered Williams dead shortly after noon that day. But Monday, Martin said he found Williams' body close to breakfast time, which would have been six hours after Williams' arrest.

The Log Cabin Democrat reported in its May 7 coverage of the inquest that Iberg and Conway Police Chief C.O. Hensly (not deceased) returned to the jail sometime in the night to

"check on" Williams. The story says the officers found that bleeding from the cut on Williams' forehead had stopped, adding that they also had "checked for mouth bleeding' and found none.

At the inquest, Flakes and Curtis Macon, another black man incarcerated in the jail both alluded to the mistreatment of Williams by officers. But their remarks were dismissed as unreliable.

Flakes also reportedly told authorities at the inquest that he and Williams had been drinking wine and liquor together, in direct conflict with the university laboratory findings. And, other witnesses who had been with Williams hours before his death said he had not been drinking that night. The Democrat has been unable to contact Flakes despite repeated attempts during the past eight weeks.

"We have never believed that Marvin died

from accidently falling down on some stairs, said Delever Williams, Marvin's 71 year-old father. He was a fine boy with a wife, a job and two small children. He was no drunk, for sure and had never been in trouble. We want to know the truth. If someone beat our son to death and tried to cover it up, we want him punished.

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Inmate spurs second look at jail death
Arkansas Democrat,
Monday, February 11, 1985

If there is one person most responsible for the Marvin Williams grand jury that impanels Tuesday in Conway, it is Charles Larone Hackney, a middle-age white inmate serving time for burglary at the Wrightsville Unit of the Arkansas Department of Correction.

Sometimes shy, but always direct in conversation, the stock, 47-year-old man from Star City has managed for years with only one arm.

Last Spring, Hackney sent a flurry of letters to state officials in hopes of encouraging a full scale investigation into what he called Williams' violent death in the Faulkner County Jail 24 years ago.

He was in the same jail on the night Williams died -- May 6, 1960. And Hackney has told police, attorneys and journalists basically the same story over the past nine months; He saw a young black man - who he said must have been Williams - brutally beaten in the cell block before dawn.

Williams, a father, paratrooper and high school honor graduate at 15 was 21 when his body was discovered face down on a cell bunk. The official finding of a coroner's inquest on May 7, 1960, was that Williams had died of a concussion. But autopsy studies indicated he died from respiratory failure brought on by an unexplained skull fracture behind his left ear.

He had been jailed only hours earlier on charges of public drunkenness. The arresting officers, Marvin Iberg and O.H. "Bill" Mullenax, testified at the inquest that a stuporous Williams had slipped from their grasps simultaneously as they were leading him to jail. Williams fell forward, striking his right forehead on the concrete stairs, they said.

The result was a superficial injury described in the autopsy report as two triangular-shaped bruises and a slender 1-inch cut above the right eye.

The inquest, called by the late Faulkner County Coroner, Robert A. McNutt and co-directed by then Prosecuting Attorney George Hartje, met for about five hours before ruling out foul play by police. Apparently the manner of Williams' death was never resolved.

Hartje, who is now a circuit judge in Conway, was quoted in the local newspaper two

days later as saying a local doctor had told him the large bluish patch on the site of the fracture behind Williams' ear could have been caused by the minor forehead injury.

Hackney, then 22, also had testified in the inquest that he had only heard some moans but had seen nothing in the cell block that night. Now he says he was coerced into lying at the inquest to protect those involved in the alleged beating.

Williams, who left behind a small son and an unborn daughter, was buried the following week. The case laid forgotten until Hackney began mailing his letters and self-styled "sworn statements" last March.

The account he painted in those letters remained relatively consistent through numerous interviews in 1984, although the story has been denied by those Hackney has named.

The special grand jury, funded through

Gov. Bill Clinton's emergency fund and under the guidance of Yelleville Deputy Prosecuting Attorney Gary Isabell, will be the next group to analyze the story in coming weeks.

Hackney told reporters last July he was in the Faulkner County Jail for grand larceny on May 6, 1960. Wind and rain gusting through a broken windowpane awakened him in a bull pen cell at 2:00 a.m. He recalls the time because he said he looked at his wristwatch.

He said he heard noises near the stairway that led up to the fourth floor cell block. Moving toward the center of the cell, Hackney said he looked in that direction and saw two men in civilian clothes carrying a listless black man between them.

Hackney said one man asked the other where the prisoner had been found. The other responded he had been sleeping in a truck with his feet sticking out the window.

They dropped him to the floor and began

striking the prisoner "more than 10 times" with what looked like blackjacks, Hackney said.

Hackney also told reporters one of the attackers was Joe Castleberry, the former sheriff, who died last July. He said he could not identify the other officer by name, except that he was one of Castleberry's deputies who spent a lot of time in the jail.

Mullenax and Iberg, the arresting

Appendix H-1

officers who had placed Williams in the cell about 1:00 a.m., according to reports, routinely wore police uniforms while on duty. Last fall, Hackney said he did not recognize a photograph of Iberg. Mullenax and former Police Chief C. O. Hensley (now deceased) in their uniforms.

Joe Martin, Castleberry's deputy jailer at that time testified at the inquest that he discussed work with Williams in the cell block

about 1:15 a.m. At that time, Martin said Williams appeared uninjured except for the forehead wound and was talking about bailing out before 7 a.m. to be at his job.

Martin testified he had agreed to awaken Williams by 7 a.m. but did not fulfill that promise after looking into the cell about 7 a.m. and finding Williams asleep and looking in again around 9 a.m. Martin said he found Williams dead about noon that day.

Iberg also testified he had agreed to awaken Williams by 7 a.m. but did not fulfill that promise after looking into the cell about 7 a.m. and finding Williams asleep and looking in again around 9 a.m. Martin said he found Williams dead about noon that day.

Iberg also testified at the inquest that he came back twice with Hensley that night to check on Williams. Iberg said Williams was sleeping and appeared all right both times.

Hackney said that after the beating, the

two men dragged the prisoner out of his sight into a nearby cell with a solid door where Hackney could hear additional blows. Afterward, he said he heard one man tell the other to clean up the mess.

Hackney said he returned to his bunk and fell asleep. He awoke about 8 a.m. to a lot of commotion in the cell block. A slender man in a suit, who Hackney said identified himself later as the prosecutor, was asking if anyone had seen anything that night. Hackney said he volunteered that he had.

"The fact that I'm what the world would call an habitual offender doesn't mean I'm an habitual liar. If I choose to tell the truth, I ought to be allowed to tell the truth. I wasn't allowed to tell what I saw."

Later that morning, he said he was taken from the cell block to an office where the sheriff and the man in the suit threatened him into lying at the inquest. When the time came to testify, he said he lied to protect himself.

Last September, Williams' family filed a federal civil rights suit in the death. They have alleged that Castleberry, Hartje, Martin, Iberg, Mullenax and the city and county were all culpable in one way or another for the death and lack of care given Williams in the jail. The suit also charges that the death was concealed.

The defendants have all denied those allegations.

Is Hackney lying about what he saw on May 6, 1960? Some say yes. But others wonder what could prompt someone convicted in 1971 of shooting a black man to insistently write authorities and others offering himself as a

witness to the beating of another black man he never knew.

Hackney has strongly denied accusations that he is lying, or trying to work a deal for shorter prison time. Last year, he offered to take a polygraph test of those he has identified will join him. So far, there have been no such tests.

In fact, his prison psychological profile test shows Hackney, who has five convictions on his record, is not prone to strong exaggeration.

He says he is motivated primarily by his conscience; the vision of what he saw that night rattling around in his brain for 24 years and the knowledge that no one ever answered for the death.

"The fact that I'm what the world would call an habitual offender doesn't mean that I'm an habitual liar," he said. "If I choose to tell the truth, I ought to be allowed to

tell the truth. I wasn't allowed to tell what I saw."

Hackney said his letters last spring were prompted by a conversation with another inmate on March 10, 1984, who told him for the first time that Williams' death had been passed off as an accidental fall on the stairs. Hackney said he had never known that before and he knew it was not what he had seen.

Last August, the Arkansas State Police interviewed Hackney and his version meshed with what he had already told reporters in July and later told others.

But the Arkansas Democrat learned late last week from a state police document that Hackney may have told Cummins inmate Jim James in the fall of 1983 that he had seen three officers, not two, beating Williams in the cell block. One of those three, James said was in uniform.

I"I was just a witness, and I would have given anything if I had not been there that night."

James also told police that Hackney had told him that someone returned with a flashlight to Williams' cell block in the night and that Martin had discovered Williams dead before daylight.

James also told the state police he gave Hackney the name of the Faulkner County prosecuting attorney during their 1983 conversation. Besides those discrepancies, other portions off the story Hackney allegedly told James paralleled what Hackney explained to others in 1984.

Hackney said the result of his allegations have caused him more anxiety than he expected. He has even expressed fear for his safety in prison.

"I was just a witness," he wrote to Williams' parents last August, and I would

have given anything if I had not been there that night."

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THE COURT: She will be one of the first 18 but she will be the eighteenth unless someone else comes behind her.

MR. HENRY: Who will --

THE COURT: Ms. Viola Sebastian that's just coming in here now.

Ms. Sebastian, just please take a seat. We have asked you to come in because during this recess we have had to excuse a couple of other jurors so we have called you and another gentlemen to replace them.

Have you been listening to the statements and the questions of the Court?

MS. SEBASTIAN: Yes, I have.

THE COURT: Would you have answered yes or felt called upon to say anything in connection with my previous statements or questions?

MS. SEBASTIAN: No, I wouldn't.

THE COURT: You don't know any of the parties or have any relationship to any of the parties to the lawsuit?

MS. SEBASTIAN: No, I wouldn't.

THE COURT: Where do you live?

MS. SEBASTIAN: Here in Little Rock.

THE COURT: And you have never lived in Faulkner County?

MS. SEBASTIAN: No.

THE COURT: Have you ever served on a jury or in any other case?

Appendix I-2

MS. SEBASTIAN: No, I haven't.

THE COURT: And you have never been involved in a lawsuit before yourself?

MS. SEBASTIAN: No.

THE COURT: Do you recall having read or heard anything about this case or seen any television or radio program?

MS. SEBASTIAN: I seen it on TV once.

THE COURT: And have you formed any opinion about the case or any of the issues in the case?

MS. SEBASTIAN: No, I haven't.

THE COURT: Can you put aside whatever you may have heard about the case before and try this case solely on the lawful evidence that is brought before you in the courtroom during the trial?

MS. SEBASTIAN: Yes.

THE COURT: Do you know of any reason why you couldn't serve as a fair and impartial juror in the trial of this case?

MS. SEBASTIAN: No.

THE COURT: All right. Mr. Hall?

MR. HALL: No questions, Your Honor.

MR. ADKISSON: No questions.

MR. HENRY: No questions, Your Honor.

THE COURT: Thank you so much. You can just go back

of your mind and base your decision solely upon the lawful evidence that is brought before you here in the courtroom?

MR. FOUNTAIN: Yes sir.

THE COURT: You may inquire, Mr. Hall

MR. HALL: No questions.

MR. HENRY: No questions.

MR. ADKISSON: I have a couple. You mentioned that you were at UCA in graduate school?

MR. FOUNTAIN: Yes, sir.

MR. ADKISSON: That was from '80 to '82?

MR. FOUNTAIN: Yes, sir.

MR. ADKISSON: What did you study?

MR. FOUNTAIN: Psychology.

MR. ADKISSON: You are now employed where?

MR. FOUNTAIN: I am not employed right now. I am waiting for a position right now at Tuskegee Institute in Alabama.

THE COURT: You have been in education?

MR. FOUNTAIN: Yes sir, I was a teaching professor at several universities.

MR. ADKISSON: Thank you.

THE COURT: If you will just go back. We are running through the list and as soon as we finish I will come into the courtroom and we will complete the jury selection process.

(Jurors leaves chambers.)

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THE COURT: Call Dottie Gill.

(Juror enters chambers.)

THE COURT: Ms. Gill, if you will just sit down for a moment. Thank you for coming in. We just wanted to bring you in here to talk more frankly and informally and also whatever you said would not be heard by the other jurors.

You were one of those who mentioned that you had heard or read or seen something about the case in the newspaper, television or something. Can you tell us about that? What

you have heard or read?

MS. GILL: Just that charges were brought up to the officials or however many there was. You know, it's been a couple of years.

THE COURT: Is there anything in what you saw or heard or read that would in any way bias or prejudice you for or against any of these parties?

MS. GILL: No.

THE COURT: And could you put anything that you previously heard or read about the case out of your mind and decide the case solely upon the lawful evidence that is brought before you in the courtroom during the course of the trial?

MS. GILL: Yes.

THE COURT: Mr. Hall, do you have any questions?

MR. HALL: No questions.

MR. ADKISSON: No questions

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RICKY WILLIAMS, ET AL
PLAINTIFFS

vs. No. LR-C-84-791

FAULKNER COUNTY, ARKANSAS, ET AL
DEFENDANTS

DEFENDANTS' BRIEF IN SUPPORT OF
REPLY TO PLAINTIFFS' MOTION FOR NEW TRIAL

Counsel for defendants exercised their preemptory challenges in the selection of the jury for the trial of this case, striking a young black male, James A. Fountain 11, a young black woman, Veola Sebastian and a young white woman, Lisa Roderick. Plaintiffs moved for a mistrial since the only two blacks selected from the larger jury panel were stricken, resulting in an all white jury. Following a hearing in chambers, at which counsel for defendants volunteered their reasons for striking Sebastian and Fountain, the Court denied their motion, and should now

deny plaintiff's present motion for the same reasons.

Plaintiffs apparently rely upon the ruling in Batson v Kentucky, 476 U.S. 79 (1986), followed in this circuit by United States v. Wilson, 816 F. 2d 421 (8th Cir. 1987) and United States v. Wilson, __F. 2d __ (8th Cir. No. 87-2280, decided August 5, 1988) as the basis for their motion.

Appendix K-1

Yet there are numerous distinguishing features between those cases and this one which should prevent application of the same dictates. The most obvious is that Batson and Wilson involve criminal cases, wherein the government is prosecuting individuals, thereby resulting in state action, while this case involves a civil rights action with no state action. As the Court in Batson pointed out, "the ultimate issue is whether the State has discriminated in selecting the defendants' venire."

(Emphasis supplied.) In Batson, in footnote 12, Justice Powell clearly indicated that the Court expressed "no views on whether the Constitution imposed any limit on the exercise of peremptory challenges by defense counsel." Plaintiffs cite no controlling case that does extend the Batson limitation accordingly, for the simple reason that there are none. Therefore, we contend that Batson does not apply to case, and that defense counsel has every right to exercise their preemptory challenges for whatever reason they may have, in line with the historical reasoning underlying the peremptory challenge system.

Nevertheless, without the benefit of study of Batson in the hearing in chambers following plaintiffs' motion for a mistrial, defense counsel offered to give the Court their reasons for striking Fountain and Sebastian, and those reasons, as the Court found earlier, passed the neutrality standard

dictated by the Supreme Court in Batson.

Appendix K-2

Plaintiffs make no mention of the reasons offered for striking Fountain, presumably because they are clearly nonracial, and supported by the information developed in the voir dire process. Fountain, the record will show, held a masters in psychology, was a college professor and a minister, yet was unemployed. He had sued his former employer and was the divorced father of five children. These characteristics create a picture of instability, undesirable in a juror.

Veola Sebastian was an unmarried mother of two, and a factory worker by occupation. At the time she was called, the voir dire was being conducted on an individual basis in chambers, allowing a more relaxed and personal examination. Ms. Sebastian's responses to questions from the Court and the attorneys were mostly monosyllabic in nature. She gave

a distinct appearance of having a low intelligence level, reflected by her lack of responsiveness. Plaintiffs concede the nonracial character of defense counsel's reasoning, but complain in their motion that "the same could be said of anyone because it is so subjective." Developing an opinion about one's intelligence is unquestionably a subjective undertaking, but intellect is also an unquestionably legitimate factor to consider, particularly for a case expected to extend several days and produce the testimony of a forensic pathologist and a neurosurgeon. Appendix K-3

Moreover, in the course of the hearing in chambers, defense counsel eventually offered to reinstate Ms. Sebastian to the jury in an attempt to avoid an appealable issue, but counsel for plaintiffs rejected the offer.

In Batson, the prosecutor struck four blacks, and the trial court refused to require

the prosecution to offer any explanation for those strikes. The Supreme Court reversed and remanded the case for a determination as to whether the state's reasons were sufficiently neutral as to race. In Wilson, the government struck all six black veniremen, and at the Batson hearing, the prosecutors offered reasons for those strikes which the Eighth Circuit found to be pretextual in nature, and effectively based upon race. Assuming for purposes of argument that Batson does apply to this case, the fact that two of the three jurors stricken by defense counsel were black does not create the same strong presumption of racial discrimination as the four and six strikes used in Batson and Wilson, respectively. In any event, the reasons volunteered by defense counsel for its strikes were legitimate, as opposed to "pretextual", and neutral as to race. Plaintiffs would be entitled to a new trial only had the Court

determined, first, that Batson dictated a neutral explanation, and, second, the explanation given was inadequate to rebut the presumption of racial prejudice.

Appendix K-4

Without ruling on the first issue, the Court already found the explanations to be sufficient to rebut any such presumption. Accordingly, the motion for the new trial or hearing sought by plaintiffs should be denied.

Respectfully submitted,

CLARK & ADKISSON
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and

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P.O. Box 1107
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By_____
William C. Adkisson

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THIS IS THE LAST OF INFORMATION THAT WAS AVAILABLE ON THE JURORS AT THE TIME OF THE TRIAL: LR-C-84-791 WILLIAMS V. FAULKNER COUNTY JULY 10, 1988

BARNHILL, CARLOTTA S. - LONOKE: Age 56; no farther information available

BRANTON, BETSY S. - LITTLE ROCK: Age 59; Divorced, 4 children; secretary for Methodist church; Ark. res. life

CAMERON, SANDRA D. - LITTLE ROCK: Age 28; Divorced, no children: sales for office systems company; Ark. res. 25 years

COVINGTON, CLINTON HAYWARD - SEARCY: Age 66; Married, no children; retired brick mason; wife, homemaker; Ark. res. 65 hears

CRIMMINS, JAMES J. - CONWAY: Age 39; married, 3 children; field service engineer; wife, homemaker; Ark res. 3 years

DE BOARD, DOY L. - CONWAY: Age 37; Married, 2 children; aircraft mechanic foreman; wife, homemaker; Ark. res. life

ELLIS, TOMMY J. - CENTER RIDGE: Age 49; Married, 2 children: papermill operator; wife, homemaker; Ark. res. 46 years

FLETCHER, DOROTHY A. - LITTLE ROCK: Age 56; Married, 3 children; retired teacher; husband, teacher; Ark. res. 48 years

FOUNTAIN, JAMES A., II - LITTLE ROCK: Age 39; Divorced, 5 children; minister/college professor; Ark. res. life

FREYALDENHOVEN, CARL J. - LITTLE ROCK: Age 42; Separated, no children; educator; wife, cashier for government agency; Ark. res. life

GEORGE, SHERRY W. - NORTH LITTLE ROCK: Age 28; Married, 1 child; warehouse supervisor for department store; husband, computer programmer; Ark. res. 7 years

GILL, DOROTHY R. - LITTLE ROCK: Age 39; Married, 2 children; secretary/bookkeeper for engineering company; husband, real estate sales; Ark. res. life

HAWKS, JOHN H., JR. - CONWAY: Age 53; married, 4 children; real estate sales; wife, homemaker; Ark. res. 23 years

HOLLINGSWORTH, CATHY - RUSSELLVILLE: Age 31; married, no children; elementary school teacher; husband, college football

HUSEAS, SUZEANNE M. - GREENBRIER: Age 30; Divorced, 1 child; aide for human development center; Ark. res. 9 years

JONES, CHARLES L. - MORRILTON: Age 35; married, 2 children; top presser for factory; wife, pinch hitter; Ark. res. 34 years

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KOCOUREK, LEE H. - DEVALLS BLUFF: Age 62; married, 2 children; retired farmer; wife, homemaker: Ark. res. life

MCGOWEN, NANCY J. - NORTH LITTLE ROCK: Age 37; widowed, 1 child; bank teller; Ark. res. 7 years

MONTGOMERY, GARY K. - NORTH LITTLE ROCK: Age 33; married, 1 child; accountant; wife, librarian; Ark. res. life

NORRIS, GLENDA J. - CABOT: Age 38; married, 2 children; high school teacher; husband, maintenance mechanic for federal agency; Ark. res. life

RAMER, ELOISE G. - LITTLE ROCK: Age 64; Married, 3 children; retired secretary for grocery chain; husband, retired food sales; Ark. res. 16 years

RODERICK, LISA G. - JACKSONVILLE: Age 24; married, no children; sales for publishing company; husband, USAF; Ark. res. 10 years

ROSE, JOHN W. - MAUMELLE: Age 51; married, 2 children; manager of marketing for life and casualty company; wife, teacher; Ark. res. life

ROSE, TAMMY T. - BELLEVILLE; Age 25; married, no children; elementary school teacher; husband, social worker; Ark. res. life

SEBASTIAN, VEOLA - LITTLE ROCK; Age 36; single, 2 children; factory worker; Ark. res. life

TURBYFILL, VIVIAN L. - BENTON: Age 47; married, 5 children; homemaker, husband, fingerprint examiner; Ark. res 26 years.

WADE, MARY JO - GREENBRIER: Age 46; Married, 3 children; homemaker; husband, self employed consultant; Ark. res. 40 years

Appendix L-2

UNITED STATES DISTRICT COURT

Eastern District of Arkansas

Date: 7/20/88 Judge: G. Thomas Eisle

Case No. LR-C-84-791

Parties: WILLIAMS et al V.

FAULKNER COUNTY, AR et al

JURY PANEL

1. Glenda Norris
2. Vivian Turbyfill
3. Dorothy Fletcher
4. Lisa Roderick
5. Nancy McGowen
6. Eloise Ramer

7. Carl Freyaldenhoven

8. Carlotta Barnhill

9. Doy Deboard

10. James Crimmins

11. John Rose

12. Charles Jones

13. Sherry George

14. Suzanne Hanseas

15. Tammy Rose

16. Cathy Hollingsworth

17. James Fountain

18. Dottie Gill

19. John Hawks

20. Lee Kocouder

21. Tommy Ellis

22. Sandra Cameron

23. Viola Sebastian

ALTERNATE JURY PANEL

1. Mary Wade

2. Betsy Branton

3. Clinton Covington

4. Gary Montgomery

Appendix M-1

still the No. 18 is going to be left out.

THE COURT: But then you still have one black that's gone. If you void both of them you would have one black on the jury.

MR. HENRY: Yes sir. I don't mind stating to the Court why I elected to strike these two.

THE COURT: It was your choice. Why don't you state and see what the basis is.

MR. HENRY: With regard to Mr. --

MR. ADKISSON: Fountain.

MR. HENRY: -- Fountain, he is, as I understand it, unemployed. He is in psychology. He sued his employer.

THE COURT: Sued his employer?

MR. HENRY: Yes. I did not feel he would make a good juror. To use the word loosely, squirley. I would have struck him black or white. I did not think he would make a good juror because of his background and the way he answered questions. He impressed me as not

being a good juror.

As to Mrs. Sebastian, Your Honor, this is a very complicated case. It's going to be technical medical testimony. All sorts of legal principles. I do not feel that she had the intelligence, to be truthful, from her appearance and from her -- the way she answered questions, to be able to fathom all of it and be a good juror. And I'm not saying it's because she's black, Your Honor. I honestly do not feel that lady would be able to keep up with the testimony that comes into this case.

Appendix N-1

I thought she was the least qualified of all of the members of the panel to serve on a jury as complicated as this is.

THE COURT: Well, I do feel it's kind of like the McDonnell Douglas thing when you articulate a reasonable ground for your actions other than race, I think you may have

climbed the hill. I am very disappointed that in the history of this, which is essentially one of the racial discrimination, at least there is a premise of it in there somewhere, that we are going to end up with a jury that's all white. But I do think you have articulated reasons that would justify your choice in the exercise of your peremptory challenges. It doesn't make much, and I do see in what you say that a lawyer could make that judgment on the basis of what we have seen in the voir dire and that would be adequate.

I think the reasonable remedy ultimately is to do away with peremptory challenges. I think they should be. In the death qualification cases that I dealt with the whole peremptory challenge thing can distort the impartiality. It can introduce discrimination in a very hidden way. But that's a larger problem that the courts are

going to have to deal with.

But given the peremptory challenge system, I think you have met the test and I am going to overrule the motion for a mistrial, expressing my concern.

Appendix N-2

And I may be wrong, but I guess the Court of Appeals will feel that this does apply to civil cases. But it is not nearly as egregious as the Clark case and it is a circumstance -- one you pointed out here -- if you had exercised one challenge against any white juror in the first 18, the black juror, No. 18, who happened to be No. 18, was not going to make it to the jury anyway; so that combination with the explanations that you have given here -- by the way, the lady was the eighteenth, was she not?

MR. HENRY: Yes, sir, she was.

THE COURT: -- that combination with the explanations you give here do satisfy the

Court that you have met the Batson criteria. And, as I say, you also have here private litigants who are the parties, as well as the county and their rights involved just as well as the plaintiffs' individual rights and their rights to use their challenges, and they have used their challenges, I assume, without any inquiry of the Court. But I don't like it. I'm unhappy. It's going to leave a cloud over this case.

Well, depending on what happens, I guess some will way, "Well, now, it was a white jury," and that could be another basis for not having to have the public acceptability that it should have, I'm afraid.

MR. HENRY: May I talk to Mr. Adkisson just a moment?

Appendix N-3

THE COURT: Yes.

(Mr. Henry and Mrs. Adkisson leave chambers for private conference.)

MR. ADKISSON: Your Honor, could I have about four or five minutes to talk to my clients?

THE COURT: You may.

(Brief recess.)

THE COURT: Are we ready to proceed?

MR. HENRY: Yes, Your Honor.

MR. ADKISSON: Yes.

THE COURT: What is the situation, folks?

MR. HENRY: Is Mr. Hall insisting that both of the blacks be reinstated to the panel or just one?

MR. HALL: Well, if the peremptory challenges were used against all white persons, both would have ended up on the jury. So as you said, if you had only exercised two, for instance, not three, then Mrs. Sebastian would go off anyway. This would be our point: it would be a way of covering up a motive in a case where it really existed. You could exercise and say, "I know the last person is

not going to get on here anyway." I have manipulated my challenges saying I don't like that last juror and I know they are going to strike this person up here and just calculate it this last one is not going to get on anyway.

THE COURT: That would have taken pretty devious thinking. apparently he is going to object to the whole thing. Do you have anything to say?

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MR. HENRY: As I told you, in my reasoning under any circumstances I would have struck Mr. Fountain as a witness.

THE COURT: As a juror.

MR. HENRY: Excuse me, as a juror. And we have talked to our clients. They are willing to let another strike be made and to let Mr. Sebastian serve on the jury if that will remove the constitutional issue. I think had we struck only one and left one of the

blacks on, that would have left no basis for your challenge.

THE COURT: Well, I have already ruled there is no basis just on the explanation you have made, but , like I say, I would feel better. But now we have the mechanical aspects of doing it. You do it now and it looks bad.

MR. HENRY: I agree.

THE COURT: Maybe all parties want to agree to a mistrial and I hate to think of it. This case has been here since 1984.

MR. HENRY: The position my clients find themselves in they don't have the money for another appeal or another mistrial.

THE COURT: Well, I think what I am going to do, Mr. Henry -- I appreciate what you have said in the statement and I don't gather that Mr. Hall wants to agree to that, do you --

Appendix 0-2

that is, in effect you knock off the twelfth

juror and replace that twelfth juror with Mrs. Sebastian.

MR. HALL: I am concerned how it would appear to the other jurors, too, at this point because they would realize -- they would have to realize by then something was up.

THE COURT: I may be wrong, but I am going to hold the defendants are within their rights -- although, as I say, I don't like the result -- that they are within their rights in view of the explanation made and they have evidenced, you know, a fairly good faith approach to this sensitive problem.

In any event, you have a record. I am going to overrule your motion for a mistrial and we will go forward.

Everybody ready? I am going to excuse the jurors and let them go, and then I am going to give them the preliminary instructions and then you have the stipulation and then we will give to them the transcripts

and maybe let them go home for the evening.

MR. ADKISSON: Delay opening statements?

THE COURT: No. How long do you think the opening statements are going to take? I would like to get those before the jury.

MR. FAUGHT: Mine will take 20 to 30 minutes, Your Honor.

THE COURT: I think we can get opening statements in and give them that stuff and let them go.

Appendix O-3

Supreme Court, U.S.
FILED
FEB 5 19[illegible]
OFFICE OF THE CLERK

No. 91-1096

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

EMOGENE WILLIAMS COBIN; BONNIE WILLIAMS GILBERT; CAROLINE WILLIAMS GILES; BARBARA WILLIAMS GUINN; VERNA WILLIAMS; HAMMOND; DONNA WILLIAMS LOCKHART; ERNESTINE WILLIAMS WEBB; DELAVAH WILLIAMS; JOHNNIE WILLIAMS; RICKY WILLIAMS; RONNIE WILLIAMS; AND SHARON WILLIAMS,
Petitioners

v.

JAMES T. CASTLEBERRY, CO-EXECUTOR OF THE ESTATE OF JOE L. CASTLEBERRY, DECEASED; CITY OF CONWAY, ARKANSAS; FAULKNER COUNTY, ARKANSAS; JOE MARTIN; AND JOCILE C. PERRY, CO-EXECUTOR OF THE ESTATE OF JOE L. CASTLEBERRY, DECEASED,
Respondents

On Petition for A Writ of Certiorari
To The United States Court of Appeals for
The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' STATEMENT OF QUESTIONS PRESENTED

I

Whether the Petition for Writ of Certiorari should be allowed for a determination whether the ruling of the Court of Appeals was clearly erroneous in holding that respondents' reasons given for exercising their peremptory challenges were not discriminatory.

II

Whether the Petition for Certiorari should be allowed for a determination regarding comparisons of juror characteristics where facially neutral explanations of peremptory challenges against blacks have been given.

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STATEMENT OF THE CASE

This litigation involves a civil rights case filed in 1984 brought under 42 U.S.C. Section 1983. The survivors of Marvin Williams, who died in the Faulkner County, Arkansas, jail on May 6, 1960, filed suit alleging that the decedent had been falsely arrested, beaten, and denied medical treatment, all at the hands of white law enforcement officers, and that he had died as a result of such actions in violation of his civil rights. It was further alleged that certain of the defendants had conspired to cover up the true cause of death for twenty-four years until a witness, a convict in an Arkansas prison, gave an account of the facts supporting the petitioners' claims to an investigative reporter, and eventually testified at trial.

The original defendants included the City of Conway, Arkansas, its two arresting policemen, Faulkner County, Arkansas, its sheriff and his chief deputy, and the prosecuting attorney who handled the coroner's inquest following the death. All parties except the county, its sheriff and his deputy were dismissed below on statute of limitations issues. The city police officers were later indicted by a grand jury on murder charges and, after a lengthy trial, were found not guilty. As to these respondents, it was alleged that, as jailers, they took custody of the decedent, and were either aware of or participated in his beating. Moreover, they allegedly were negligent in failing to provide the medical care he needed, and he died as a result of the beating and lack of care.

The case was tried before an all white jury of twelve persons over a five-day period in July of 1988. Of the twenty-one person jury panel, three were black, and one of those was excused for cause. Defense counsel exercised peremptory challenges to exclude the remaining two venirepersons,

namely James Fountain and Viola Sebastian, as well as one white woman. The petitioners timely objected to the challenges on equal protection grounds, moving for a mistrial. The district court considered the issue, and without the need for ruling whether *Batson v. Kentucky*, 476 U.S. 79 (1986) applied to this civil case, defense counsel volunteered their grounds for exercising the objectionable strikes.

They explained that they excused Ms. Sebastian because, due to her slow and tentative manner, as well as general lack of responsiveness, they did not believe she had the intelligence to understand the technical medical and forensic evidence to be presented over an extended trial. As to Mr. Fountain, he was stricken since he seemed "squirley", as evidenced by the fact he had a master's degree in psychology, had taught at several universities yet was unemployed presently, was the divorced father of five, and had sued his university employer. Based upon these representations, the district court found the peremptory challenges to have been race-neutral in motivation, without the discriminatory intent proscribed by *Batson*, and denied the motion for a mistrial.

The case proceeded to trial, and after five days of testimony, the jury unanimously returned a verdict on interrogatories for the respondents on all counts. The petitioners filed a motion for a new trial on the jury selection issue, questioning the peremptory challenge of Sebastian, but without mention of Fountain. After holding its decision under advisement pending an Eighth Circuit case applying *Batson* to civil cases involving governmental actors, the trial court denied the motion for new trial in furtherance of its finding during the trial that the respondents had articulated a neutral justification for the challenges. *Williams v. Faulkner County*, LR-C-84-791 (E.D.Ark., June 27, 1990)

The petitioners appealed, and the Eighth Circuit Court of

Appeals affirmed the trial court decision on April 24, 1991, in a *per curiam* decision that the lower court's findings were supported by the record. *Cobin v. Castleberry*, 90-2276 (8th Cir., April 24, 1991).

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE ALLOWED FOR A DETERMINATION WHETHER THE RULING OF THE COURT OF APPEALS WAS CLEARLY ERRONEOUS IN HOLDING THAT RESPONDENTS' REASONS GIVEN FOR EXERCISING THEIR PEREMPTORY CHALLENGES WERE NOT DISCRIMINATORY.

Petitioners invoke the jurisdiction of the United States Supreme Court pursuant to Rule 10(l)(c) of the Rules of the Supreme Court [and presumably pursuant to 28 U.S.C., Section 1254(1)]. That rule provides as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> . . . .
>
> (c) When a state court or a United States court of appeals has decided an important question of federal

> law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

Clearly the jurisdiction of this Court is meant by this rule to be extended with questions of law in the federal realm, as opposed to questions of fact. Yet the first issue posed by the petitioners just as clearly involves a question of fact, whether there was factual evidence in the record for the district court and appeals court to find that the reasons given by defense counsel for exercising the challenges were race neutral. For the sake of brevity, respondents will not argue herein the facts to rebut the allegations of the petitioners. Respondents will, instead, rely upon the decision of the district court (A. 10), in its memorandum and order denying the motion for new trial, which clearly set out its findings of facts with regard to the two venirepersons in question. After it carefully examined the record, the Court of Appeals affirmed the district court's findings that defense counsel exercised their strikes according to neutral criteria, and not for racially discriminatory purposes, as supported by the record. (A. 1-2, pp. 6-7).

Previous decisions of this court have denied petitions for writs of certiorari to review evidence and address specific facts. In *United States v. Johnston*, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925), Mr. Justice Holmes said "We do not grant a certiorari to review evidence and discuss specific facts." Writs of certiorari will not be granted by the Supreme Court except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955). The Supreme Court will not ordinarily grant certiorari to review judgments based solely on questions of fact. *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 84 L.Ed. 704, 60 S.Ct. 493 (1940). Moreover, this

Court has repeatedly held that appellate courts must constantly have in mind that their function is not to decide factual issues de novo. Their authority, in reviewing findings of the judge, as well as those of the jury, is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh evidence. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 23 L.Ed.2d 129, 89 S.Ct. 1562 (1969).

The petitioners are now represented by different counsel from those representing them below. Neither they nor this court has had the benefit of the trial judge, handling the voir dire jury selection *in camera* on a one-to-one basis, in evaluating the jurors and the process. Respondents maintain that this court should not grant certiorari to review evidence, but should give due deference to the trier of fact, and deny the petition.

II.

THE PETITION FOR CERTIORARI SHOULD NOT BE ALLOWED FOR A DETERMINATION REGARDING COMPARISONS OF JUROR CHARACTERISTICS WHERE FACIALLY NEUTRAL EXPLANATIONS OF PEREMPTORY CHALLENGES AGAINST BLACKS HAVE BEEN GIVEN.

As was the case with the first issue above raised by the petitioners, jurisdiction of the Court is invoked pursuant to Rule 10(1)(c) of the Rules of the Supreme Court on the basis of alleged important federal questions of law yet settled. Yet as was also the case on the first question above, the issue raised by petitioners does not deal with an important federal question of law in need of resolution, and certiorari should not be granted.

As petitioners recite in their own argument (pp. 29-30), the Eighth Circuit has already established the "comparability" standard which the petitioners seek this Court to institute. In both *United States v. Wilson*, 853 F.2d 606 (9th Cir. 1988) and *Garrett v. Morris*, 815 F.2d 509 (8th Cir. 1987) (Cert. denied, 484 U.S. 898, 98 L.Ed.2d 91, 108 S.Ct. 233 (1987), blacks were excluded as jurors on the basis of pretextual explanations. In the course of determining whether racially discriminatory practices had been used, the Eighth Circuit employed the "comparability" standard by viewing the characteristics of the individual which prompted the government's strike with characteristics of those not struck by the government.

An examination of the district court's memorandum and order denying the motion for new trial reveals that the court employed this test in arriving at its decision. The court says:

> "Unlike *Wilson*, the explanation offered by the defendants for striking Ms. Sebastian does not depend on her racial affiliation. If through voir dire, or otherwise, it develops that a particular juror is deficient in the intelligence needed to understand some aspect of the case, then that circumstance will provide an adequate basis for exercise of a peremptory challenge under *Batson*. Such assessments are indeed subjective. Yet it is the very essence of the peremptory challenge to allow an attorney to 'act on only limited information or hunch' exercising his 'intuitive judgment' that a particular juror would be unfit for the case to be tried. *Batson*, 476 U.S. at 123. *Batson* modifies the breadth of an attorney's discretion to strike jurors by foreclosing as a possible reason for such strikes the intuitive judgment that a potential juror will favor his client's adversary because of shared racial or ethnic affiliation. *Batson* does not

> prohibit subjective assessments of a juror's qualifications when such assessments are based on qualities other than race." (Appendix pp. 28-29, C. 10)

The Court goes on to say:

> "Having conducted the *voir dire* in chambers, on a one-to-one basis, and having had the opportunity to closely observe the demeanor of the jurors, the Court finds that the defendants' proffered explanation was clear and specific and entirely credible. Moreover, it is clear to the Court that none of the other white venirepersons who formed the petit jury exhibited characteristics comparable to those that led the defendants to make their strikes." (Appendix C-10) (Emphasis added).

Clearly, the Eighth Circuit has already established the "comparability" standard which the petitioners seek the court to impose upon review of the case. Petitioners do not allege that test to be in error, nor do they make reference of any kind to contrary holdings of other jurisdictions which require review in order to establish uniformity of decisions in the federal appellate system. Assuming, for purposes of argument, that this court upheld the *Wilson* "comparability" standard, the legal result presumably would be no different since that test was applied below. In effect, the argument propounded by petitioners questions the findings of fact made by the district court and affirmed by the Court of Appeals in applying the comparability tests to individual venirepersons. No important federal question is raised by petitioners, and their petition for certiorari should be denied.

CONCLUSION

While this case carries issues of importance to the parties, it does not involve any noteworthy legal principles. Petitioners effectively seek review by the court of factual decisions made below. This decision does not require the resolution of any important federal issues, nor does it conflict with rulings from other courts. In summary, there is no significant or compelling reason to review the matter, and the petition for certiorari should accordingly be denied.

Respectfully submitted,

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